CHAPTER 4

TRUTH OR CONSEQUENCES: ARBITRAL RULINGS ON DISCIPLINE FOR ALLEGED ABUSE IN LAW ENFORCEMENT, EDUCATION, HEALTH CARE, AND CUSTOMER SERVICE SETTINGS

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Ira Jaffe: For our initial program we have constructed a series of four hypothetical cases around a central theme—the proposed discipline of employees for cases involving allegations of abuse. The hypotheticals take place in four different settings: health care in a nursing home, a police environment, a school district, and a trucking customer service setting.

We are fortunate today to have two distinguished advocates—Victoria Hedian for the union and Willis Goldsmith for the company—and a panel of experienced arbitrators to react to the questions that are thrown at them by the problems, the advocates, each other, and me. We are going to start with the health care case. [Due to time constraints, only three of the four cases were discussed at the session, but we have reproduced all four hypotheticals in their entirety in the appendix that follows the discussion.]

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I. Case #1: Health Care

Editor's Summary: The grievant is a Certified Nursing Assistant (CNA) at a nursing home. She has been accused by Patient B of striking Patient A—an Alzheimer's patient who, the grievant says, kicked out at the grievant and used a racial epithet. Patient B reported the case to the charge nurse, who interviewed the grievant after ignoring her question about whether a union representative should be present. The grievant denies the charge, and a second CNA who was in the room backs up her account. The nursing home reported the incident to the state health care agency and suspended the grievant without pay. The state agency found no proof of patient abuse and the home took her back, after a 1-month suspension, but without back pay.

Willis Goldsmith (Management): Surveys and television reports make it clear that patient abuse is a pervasive and alarming problem in our nation's health care facilities. An employer such as a nursing home simply cannot tolerate abuse in any form. It strikes at the heart of the home's very purpose—compassionate care for the people who are residents. The impact of abuse in a nursing home is devastating, not just on patients but on their families. The home also risks civil and criminal penalties for not adequately addressing abuse. Indeed, by tolerating patient abuse, a nursing home can lose its license, and its eligibility for Medicare and Medicaid may be affected. As a result our home takes very seriously allegations of patient abuse and we act promptly and thoroughly but fairly in dealing with those issues.

What happened on June 1, 2001, was that Patient A was simply manhandled by Miss Carter, the nurse who was attending. She performed certain tasks on Patient A that were done so brutally that Patient A cried out in pain. There were witnesses to that. The entire sequence of events was observed by Patient B, who was lying in bed next to Patient A. Patient B is a 42-year-old male who is there as a result of a car accident and is in full control of his mental faculties. Ultimately, and as the facts make clear, the events were reported up the chain of command and the home decided that a full investigation was necessary as well as a report to the state health agency. The home suspended Miss Carter pending the outcome of the investigation,

Ultimately the state health care association determined that there was insufficient proof of abuse to take legal action against Miss Carter or the home. However, the investigation in no way

cleared Miss Carter. Because the home has a zero tolerance policy against patient abuse, the review of the facts led the home to give Miss Carter a second chance, and it reinstated her without back pay. We submit that credible evidence establishes beyond any question that the penalty that was administered took into account all the relevant circumstances.

Victoria Hedian (Union): After reviewing the facts reported above, the union contends that the key issue before the arbitrator is whether Miss Carter, who did nothing wrong, should be deprived of a month's wages or whether the home, who made the choice to suspend her, should restore those wages. We believe Miss Carter should be made whole in every respect. She should not be punished just because an allegation was leveled against her.

There are some questions that will arise concerning how the evidence is presented today. In our view the testimony of Patient B must be presented in person. Otherwise, there is no witness for the union to cross-examine. These hearsay statements in the home's reports are now multiple hearsay and cannot be admitted for the truth of the matter contained in them. We must be permitted to cross-examine Patient B, which is the reason that the union has requested that he be subpoenaed. We can address the subpoena and the motion to quash in a moment.

One more item should be brought to your attention. An additional reason for granting the union's grievance is the employer's flagrant *Weingarten*[1] violation. Charge Nurse Day called Miss Carter into an investigatory interview. Miss Carter asked if she needed union representation. Miss Day ignored that request and went ahead with her questioning. Miss Carter's inquiry clearly triggered *Weingarten*. The employer then had the choice of granting her request for union representation, ending the interview, or offering the employee the choice of going ahead without union representation or forgoing the interview and any possible benefits and exoneration that might come from it. The employer cannot continue an interview unless the employee voluntarily chooses to remain after having been presented with the choices. That never happened. The interview therefore violated Miss Carter's section 8(a)(1) rights under *Weingarten*, and the discipline should be invalidated.

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[1]*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975).

Ira Jaffe: The first question we're going to pose to the panel relates to the union's request for a subpoena to compel testimony from Patient B at the hearing. Are there any additional arguments counsel would like to make before we pose that to the panel?

Victoria Hedian: The union has requested the arbitrator to sign a subpoena for Patient B to testify at the hearing. The employer has moved to quash the subpoena, citing a contract provision that says the arbitrator is precluded from drawing an adverse inference from the employer's failure to call a patient at the arbitration hearing. It seems that the employer is trying to get in arbitration what it didn't get at the bargaining table. It did not get the right to shield patients from a valid subpoena, it just got rid of the usual missing witness inference. If we must give effect to the precise terms in the contract, there is no authority in the contract for quashing the subpoena. The contract just gives the home the choice not to call a patient as a witness; it doesn't say the union cannot. If an arbitrator has subpoena power under section 301, which courts have held that he or she does, that power can be validly exercised here.

Furthermore, the Health Insurance Portability and Accountability Act (HIPAA) would not preclude the subpoena. It does not make health information inaccessible. Protected health information can be disclosed in two instances. One is as required by law and the other is for judicial and administrative proceedings. We would certainly be willing to accommodate the patient's condition by holding that portion of the hearing at the home, so that Patient B would not have to travel and would not be unduly inconvenienced. If the home is relying on his testimony, as it must because there is no case without it, we must be permitted the opportunity to cross-examine.

Willis Goldsmith: The fact is that the contract is the contract. Much of what you've heard from counsel for the union is an effort to avoid not just the plain language of the contract but the intent and spirit of the contract. The reason that the contract prohibits the arbitrator from drawing an adverse inference if the employer fails to call a patient or a member of the patient's family at the arbitration hearing is that the home has a compelling interest in protecting all of its residents. The fact that the subpoena would go to a person who is physically incapacitated, but whose testimony would surely support the employer's position, demonstrates the lengths to which the home is prepared to go to vindicate its policy of protecting all residents. The subpoena should be quashed.

Let me underscore one point here. The employer, by its attempt to quash the subpoena, is in effect acting against its own interests because we are very comfortable that Patient B is going to testify in a way that would help the employer's position. The fact that we are willing to take that risk supports the home's decision to take disciplinary action against Miss Carter. We need to protect Patient B's mental as well as physical health, and we must as a matter of policy minimize the involvement of patients and third parties in fairly standard labor management and employee relations issues.

Ira Jaffe: The first question assumes that the arbitrator has signed the subpoena ministerially without knowing who Patient B was and later receives the motion to quash. Panelists, would you grant the motion to quash the subpoena? None of the panelists would grant the motion. Why?

Andrew Strongin: Because I think it's an appropriate request to seek the testimony of Patient B. I don't know why the union wants it and I don't have a sheriff's department to enforce it. If he doesn't testify, he doesn't testify, and the provision saying that I won't draw an adverse inference from the absence of B is pretty clear.

Ira Jaffe: Does everyone share those views or do we have some different reasons for why you would refuse to grant the motion to quash?

Kathleen Miller: I basically share those views. I, too, don't understand why the union wants the witness to testify. As I understand the facts, though, the employer's entire prima facie case is based on the report of Patient B, and I think the union should be afforded the opportunity to investigate the reliability of that report if it wishes to do so. I note also that the employer is not barred under this contractual provision from calling the other CNA, James Smith, but the contract permits us to draw an adverse inference in his case.

Shyam Das: Because the contract does address the issue of patients not being called to testify, I think that if the parties wanted to avoid subpoenas they would have put it in the contract. Also, this patient does not appear to have any of the traditional reasons for receiving protection. Although he's paralyzed from the waist down, he does not have Alzheimer's, where concerns for the impact on the witness might be stronger.

Mei Bickner: The contract doesn't bar subpoenas. It just says you're precluded from drawing an adverse inference from the employer's failure to call a patient or a member of the patient's family. Here it is the union who wants to call B. You might want to

ask why the union wants that if he's not going to testify. He was the only one who was a witness and claims he saw what happened. I don't see a reason for quashing the subpoena.

Ira Jaffe: At least in my experience, in very few of the cases does anybody ever try to call the patient in health care. I think it's an unwritten but accepted practice in the industry that patients do not testify in arbitration proceedings.

The next issue relates to hearsay. The state health care agency has issued a report that ultimately decides not to go forward with respect to any charges against the nurse. Does either of the attorneys want to add anything?

Victoria Hedian: I found myself very torn about this report because my knee-jerk reaction is that the report can't be admitted, in the same way that we would not admit an unemployment compensation decision or that of some other tribunal interpreting other laws. However, because the report exonerates the nursing assistant, I feel torn between my desire to use the evidence and my desire for consistency. I think that a report of this type might be useful as a shortcut if both parties agree that it should be used, but I think in the face of the objection that it contains hearsay it should not be used. Had the report implicated Helen Carter, I certainly would have objected to its admission.

Willis Goldsmith: I would argue in almost every instance that a report like this should not come in. I do not understand why under these facts the home wanted it to come in. I suggest that it doesn't necessarily exonerate Miss Carter. What I believe is that the home thought it could be gotten in under Federal Rule of Evidence 803(8) as an exception to the hearsay rule because it's a kind of government record. There is evidence in the report that is reliable, and it was prepared by people who have no interest in the outcome of the arbitration proceeding. I don't know what standards the state health care association uses in determining whether or not there has been abuse, but there certainly will be factual assertions and testimony from Patient B and other testimony that I think would probably justify at least the 30-day suspension. That's why I think the home wanted to get this report in.

Ira Jaffe: The report is offered by the employer for the truth of the matter contained therein and there's an objection. How do you rule? There is a 5–1 vote with Andrew Strongin in the minority.

Andrew Strongin: I understand the rule against hearsay and that the hearsay rule is not applicable in a formal manner in a labor arbitration context. I would admit it, but I would inform the parties

that I know very little if anything about what the standards are for that report and whether the union or the grievant was a party to that process. Sitting at a hearing and knowing as little about the report as I would at a regular hearing, my sense is that I would accept it and let the parties know that I have great reservations that it was going to be worth anything. I would make it very clear that it's a hearsay report and I'm not going to hang the grievant on a report that she can't cross-examine.

Ellen Alexander: If you'll look at the description, you will see that these are not verbatim witness reports. These are summaries, so it's not just a matter of hearsay versus nonhearsay. It's a matter that we're not being given signed witness statements, which you'll see in other examples, but someone's summary. We're doing a de novo determination based upon our evidence.

John Kagel: The motivation for putting this in is for the conclusion rather than for what the summary said. Unless the parties' contract says that the grounds for determining discipline are going to be based on what the state concludes, it's totally irrelevant. The summaries may be useful at some point for inconsistent statements, if they are complete enough to do that. But that would go to an individual witness' testimony. I do not think the report has any place in this proceeding.

Kathleen Miller: I don't know that I agree with that. I certainly would not admit the report for the truth of the matter. There is a distinction between a report of this nature and the report of the outcome of an unemployment compensation proceeding, which occurs separate from and subsequent to the employer's determination regarding disciplinary action. I don't find this report totally irrelevant because the employer relied on it. I think our facts said that it was in response to this report that the employer took the action it did. That doesn't mean that the report or anything in it is dispositive, but I would admit it for the legitimate purpose of permitting the parties to explore the basis for the disciplinary action before me.

Ira Jaffe: Would the panel change its views if the individual from the state came to authenticate the report and indicate that the statements that are summarized therein were in fact taken through investigations and interviews? [A unanimous no from the panel.]

Do you all reach the same view if the report concludes that the license needs to be pulled?

Ellen Alexander: I think that brings in another issue. If the license has been lost, since the home cannot employ unlicensed

health care workers, the report could be admitted to show that the license has been lost

Ira Jaffe: So the reason then becomes irrelevant?

John Kagel: To me it doesn't really matter whether it's a summary, a one-line conclusion, or a full evidentiary hearing and a big transcript. I'll stick with my initial position that if you want that to be the proceeding, put it in the contract and you don't need me.

Willis Goldsmith: I think that the report ought to come in. It includes summaries, but it is not limited to summaries. There are other facts in the report that may be helpful. Certainly, I would think that the arbitrator who is hearing the case would have the ability to sort through the hearsay, draw his or her own conclusions about whether or not witnesses should be called, and draw inferences, if necessary, if witnesses are or aren't called. I find the notion startling that the report of a state agency conducting an investigation in a completely neutral manner for a completely neutral purpose should be kept out. It has been my experience that many arbitrators let many things in "for what they are worth." Keeping this document out doesn't seem to be able to advance the purpose of the hearing. You can give it whatever worth you want, but keeping it out altogether is a harsh ruling.

Shyam Das: I don't actually think that that's what the majority of this panel would do. I think the way the question was phrased put it in terms of admitting the report for the truth of the statements therein, and since the employer is putting it in I assume that it's for the statements of the witnesses, which are summary statements and clearly are hearsay. I would admit the report, however, taking into account that it is hearsay.

Ira Jaffe: But if you don't take it for the truth and if six people are interviewed in the report and only one takes the stand, the statements of the other five to the extent that they can either corroborate or rebut take on no weight.

Shyam Das: That may be true.

Ira Jaffe: Ms. Hedian, I ask that you forget that you are representing this position in this case. Would you typically object to the introduction of these reports for the truth?

Victoria Hedian: Yes. Yes, I would.

Ira Jaffe: Regardless of whether they inculpate or exculpate?

Victoria Hedian: Most likely, yes.

Ira Jaffe: Let's shift to another question. The home offers six prior incident reports in which the grievant was alleged to have

committed verbal and/or physical abuse spanning her 13-year career with the home. None of those reports resulted in disciplinary action. The home is trying to enter them into evidence, and there is a contract provision that says that after 2 years all discipline will be expunged from an employee's record and may not be considered by the employer for disciplinary purposes. Do you sustain an objection by the union concerning the admission of those reports?

Mei Bickner: This cuts two ways. I don't know about allowing something that occurred 13 years ago, but certainly within the last 2 years. Employers routinely put in incidents of this nature. The arbitrator has to remember that the grievant was not disciplined for any of these incidents. The incidents might be very different from the case that is before us. A second reason for admitting this material would be to determine how management acted in prior cases that were similar to the case before us. The incidents might show, for example, that in similar cases they didn't discipline her and now they discharge her. I don't have a problem with looking at the specifics of each these incidents but limiting it probably to 2 years and remembering that they did not discipline her for it.

John Kagel: I'm having a hard time understanding how this particular grievant was supposed to meet some charge made 13 years ago that never resulted in discipline, let alone one that occurred 6 months ago that never resulted in discipline. If you let it in, I think your hearing is going to meander and possibly flounder or fail. More importantly, it's simply unfair. If the employer disciplined the grievant, that's fine. But if the employer did not discipline, and it has a 2-year rule, it is unfair for it now to bring up 13 years of stuff that it never even bothered to discipline the individual about. On multiple grounds I would sustain the objection.

Willis Goldsmith: I think the answer to the question depends in part on how the evidence comes in. Undoubtedly the union is going to argue that Miss Carter was the world's greatest nurse and she is going to testify at length about her sparkling work record. Note that the contract says that discipline should be expunged after 2 years but it says nothing about "incidents." I think that cross-examination based upon these prior incident reports would be appropriate to challenge her claim to a spotless work record. And how much weight do you give to it? Certainly

something that happened 13 years ago would not get much weight, but I think it comes in to counter the "spotless work record" testimony.

Ira Jaffe: So the incident reports that don't result in discipline stay in and those that do stay out.

Victoria Hedian: How ironic.

Willis Goldsmith: It is, but the contract says "discipline."

John Kagel: She says she never touched anybody and there's never been any report of any bad news and maybe that's appropriate impeachment.

Ira Jaffe: So you let it in to impeach after she got on the stand?

Ellen Alexander: We are often asked to look at the whole employee, but what is the employer asking us to do here? Assume that these incidents are discipline. A party argues that "this is the whole employee; we want you to have a picture of this employee if and when you get to the issue of remedy." This is a very complicated issue, but I think the employer is doing the old criminal law act—"if there's smoke there's fire. We want to show you a prior pattern even though there's no discipline in order to help you find that it happened here." Very difficult.

Kathleen Miller: I wonder what the management representative would say in the hearing if the grievant had a series of progressive disciplines before the incident at issue, never grieved any of those disciplines, and then at the hearing the union representative wanted to go into the merits of those ungrieved incidents in an attempt to show that those steps of progressive discipline should not have been imposed. As a matter of basic fairness, management representatives object strongly to such efforts. As a matter of basic fairness I wouldn't permit this evidence in.

Willis Goldsmith: Just to clarify my own position, there's no way I'm going to put in a set of reports going back 13 years. I'm just defending the facts here.

Ira Jaffe: Let's skip to another question. Smith is the co-worker who gave an exculpatory story to management when interviewed with respect to the nurse. Neither party calls Smith. Do you draw an adverse interest against the union based upon the failure to have Smith called to the stand?

Shyam Das: He's already reported that he didn't see or hear anything. In a "fellow employee" situation such as this, I wouldn't place very much weight on the parties' failure to call him to state the affirmative for the grievant.

Ellen Alexander: We are not sure what Smith would testify to, but he's there. We have a very detailed claim of misconduct—a comment, a slapping, a shaking of the head, and a bending of the knee. If someone who was right there says that he saw nothing like that occur, I think that that's a substantial reason to wonder why that witness is not being called. I would draw a negative inference.

Kathleen Miller: I don't see a basis for drawing an adverse inference against the union. It's not the union's burden in this case; it's the employer's burden to establish just cause.

Andrew Strongin: I think it might depend on how the union pursues the case. If the union argues from the outset of the case that, absent testimony from Patient B, there is no evidence against the grievant, I would not draw an adverse inference if Smith did not testify. But if the union litigates to the hilt and for some reason Smith is absent without any explanation, that might be different.

Ira Jaffe: Some people contend that there is a practice that we see in a lot of cases where the union refrains from calling supervision and the employer, from calling members of the bargaining unit. How does this play into your willingness to either draw or not draw an inference?

John Kagel: Fortunately, I come from a part of the country where that tradition is not followed. I think it leads to fairer results because you're getting a better picture of what's going on. To say that you draw an adverse inference doesn't mean that it is a fatal adverse inference. It's simply one factor among many that goes into the decision. I don't think Smith's failure to testify would tip the scales.

Willis Goldsmith: Can I add a twist on the facts? Earlier my motion to quash the subpoena for Patient B was denied. So Patient B testified and if you assume that Patient B testified as we think, and then the union doesn't call Smith, what's the answer?

Ellen Alexander: If Patient B testifies, the adverse inference is much stronger.

John Kagel: Except if you had that case where Smith testified very strongly and very believably. If Patient B supported the employer's position strongly, I wouldn't care whether Smith testified or not, and I would not worry about an adverse inference because the employer has carried the burden and won the case.

Ira Jaffe: How many people actually ask questions if you're thinking about drawing an inference? Like, is Smith still alive? Does Smith still work for the home?

Shyam Das: I think that's one of the problems of drawing an adverse inference. You don't know why a witness wasn't there.

Ira Jaffe: Most people take the strong but silent approach.

Shyam Das: I would not ask those questions.

John Kagel: I might ask in the hallway. A lot of times I figure that counsel has a reason, or, by the time I've gotten to that point, I've already figured out that they wouldn't know if they have a reason.

Mei Bickner: I probably wouldn't ask unless I knew the parties very well or unless it was a very critical point. There are many reasons an advocate wouldn't put on a witness—maybe Smith is one of these nervous types. I had a witness once whose testimony appeared to be credible, but he was so nervous, he made me nervous. So the advocate might decide that he's going to sound like he's fibbing when he actually might be telling the truth. There might be a dozen reasons why the union doesn't want to put on Smith. So I'm very careful about questioning why they did not put on a witness.

Ira Jaffe: The next question deals with the union's attempt to secure information on the psychiatric history and medications taken by Patient B. The union seeks to compel the home to disclose that information. Is there a valid privilege against disclosure of this information assuming B does not consent to have it brought into play?

Victoria Hedian: Of course the union views these medical records as relevant because if he's taking anti-psychotic drugs or has paranoid schizophrenia, that's going to affect how one would assess his credibility. In our view HIPAA would not make those records off limits. A covered entity, which the home would be, can disclose protected health information pursuant to a court order or a subpoena or a discovery request or other lawful process without court order if reasonable efforts were made to give the person, whose records are being subpoenaed, notice of the request. If the covered entity, the home, is uncomfortable with the efforts that have been made by the requesting party, it may undertake reasonable efforts to provide the same notice. So the HIPAA regulations balance the need for information with the individual's privacy.

Willis Goldsmith: If I were representing the home, I would be reluctant to argue that this evidence should stay out because I would not want to have that argument thrown back in my face when I wanted to get this information. HIPAA provides a number of ways to ensure the privacy of the data.

John Kagel: There very well may be more restrictive state laws than HIPAA. I think in California there's a more restrictive privacy situation. Whether Patient B's records are preempted or not may be beyond our worry, but it's something we have to know about. It also raises the issue of whether we are going to get these things routinely every time somebody is discharged, whether it has anything to do with a health plan or not.

Mei Bickner: I'm concerned about this issue because here we have a patient who's paralyzed from the waist down. He doesn't have Alzheimer's and there is no indication that he's taking any kind of medication that would make his brain fuzzy. I would want to hear from him before I release. If he does not give consent to have his medical records released, I would want to hear some arguments before just releasing them. I would want to be briefed before I would go ahead.

Ira Jaffe: If you knew that there was a federal privilege that applied to psychiatric and mental health treatment records and neither side raised it, would you raise it, or would you simply rule based on the presentations? I've had subpoenas for mental health records returned by the outside third-party health facility because they could not comply with 42 U.S.C. because doing so would be a criminal violation.

John Kagel: If I knew about it I would probably ask. If I didn't know about it I doubt if I would do independent research on it.

Willis Goldsmith: Would you object or would any of the panel object to a question about whether Patient B is taking any medication? Surely, that's an appropriate question, asked by many people as the first question in a deposition. If the answer is yes, then what medications is he taking? Then if he identified an anti-psychotic medication, assuming that both parties agree, there can't be any question about this kind of evidence.

Ellen Alexander: You always have the right to test your witness to show that that witness has the capacity to analyze, to think, to speak and describe what he has observed and believes. You always can test your witness's mental capacity.

Ira Jaffe: But what if he doesn't answer or if we subpoena him and he doesn't show? It puts the home in a box, doesn't it? They've interviewed him, they relied upon his statements, and he's now unwilling to cooperate and they have no control over him

Why don't we jump to the bottom line question: based on the original facts, do you find just cause for the suspension? [Five panelists voted yes and one abstained.]

As is often the case, it's the procedural and proof questions in these cases that appear to be the most vexing and challenging. Once you've managed to sort all those factors out out and determine whether something was proved or not, we don't normally spend a lot of time wrestling with respect to the propriety of the penalty.

II. Case #2: Police

Editor's Summary: This case involves the discharge of a Caucasian police sergeant for firing eight shots into the body of an African American teenager who had in turn fired four shots at him. The case was investigated first by the Internal Affairs Division, which determined that he should be suspended for 30 days. The police commissioner, however, chose to discharge him. This case involved whether the police department had just cause for discharge.

Willis Goldsmith: Sergeant Johnson shot a man *eight times* while off duty. Not once, not twice, not three times, not four times . . . but eight times he shot the young man. The man turns out to be a teenager. The young man is now paralyzed from the waist down. What you will hear from the union is that Sergeant Johnson is a much-decorated police officer with 20 years of service and that the department is just responding to community pressure to do something because Sergeant Johnson is Caucasian and the person he shot is an African American teenager. You will hear from the union that the teenager might not have been such a nice fellow himself. He was a member of a gang that openly advocated that police be shot. But none of that really matters. What matters is the number eight. That's how many times Sergeant Johnson shot him.

You will hear evidence about the investigation that the Internal Affairs Department (IAD) conducted, which concluded that Sergeant Johnson had used excessive force when he continued to shoot this young man after the young man had dropped a weapon. This weapon had been fired four times and had the young man's fingerprints on it. However, you do not know if he shot it and, despite the four spent shells in the area, you don't know really how they got there. We don't know whether there were other people around and we don't know whether somebody else stole this gun, but we do know from IAD that Sergeant Johnson shot this man eight times—at least four times when he was already on the ground.

The IAD found Sergeant Johnson guilty of violating the department's directive on firearms and recommended that he be suspended. The police commissioner overruled that decision and found that his violation of police department regulations was such that he ought to be discharged. That discharge decision was consistent with the department's stated policy on dealing with excessive use of firearms under such circumstances. What we will show by the witnesses testifying here is that the department acted reasonably and fairly in its internal investigation of the incident and that it acted consistently with its disciplinary code in discharging Sergeant Johnson. The grievance therefore should be denied.

Victoria Hedian: Charles Johnson, the grievant, has been a police officer for over 20 years. During his career he has been decorated for valor *50 times*. Not once, not twice, not three times, not four times . . . but 50 times Sergeant Johnson was formally decorated for valor. While off duty, Sergeant Johnson encountered a young man on the street with an automatic weapon. He ordered him to drop the weapon. The young man fired at Sergeant Johnson and he returned fire. He wounded the youth, who is paralyzed as a result. Although the youth denied having received a warning or firing at the officer, ballistics confirmed that the youth fired four shots from his weapon. He also belongs to a gang that advocates killing police officers.

The case generated a great deal of publicity. The youth was charged with several crimes but acquitted. Sergeant Johnson was placed on administrative leave pending an internal affairs investigation. After the IAD report found him to have used excessive force after the youth dropped the gun, the sergeant was criminally charged with excessive use of force and assault and battery. He was suspended pending termination for conduct unbecoming an officer—that is, being arrested while off duty and violation of the department's firearms directive. A police board of inquiry found him guilty of violating the firearms directive and recommended a 30-day suspension, but the police commissioner nonetheless discharged him.

Sergeant Johnson has been acquitted of all criminal charges. The issue now is whether his discharge is for just cause. The police department, which brought the criminal charges against him, failed to prove them, and we believe that generates an issue of issue preclusion or collateral estoppel. Clearly, there is no just cause for this discharge. Political pressure obviously had a great deal to do

with it. I note as well that the young man is suing the city and Sergeant Johnson. The best solution for both the city and the union would be for the arbitrator to uphold the grievance and reinstate Sergeant Johnson.

Ira Jaffe: The department is going to offer the IAD investigative report much like the nursing home offered the state report in the last case. Is this report admissible? And if so, for what purpose?

Victoria Hedian: The union would argue that the report might be admissible to show that there was a report, but not for the truth.

Willis Goldsmith: I would make the same arguments on behalf of the department that I made in the previous case except to note that these aren't summaries, these are written statements on the evidence and the facts that we have before us. There are transcripts of tape-recorded interviews, for example, and they are much more reliable than the report of the state health care association in the previous case. I think they come in for the truth.

Ira Jaffe: The department simply offers the report for the truth contained therein. Do you go ahead and admit it for that purpose?

Ellen Alexander: In my very extensive work with a major police department I get interviews all the time. These are taped interviews. These are presumably sworn statements signed by the witnesses accompanied by transcripts. I would leave out the conclusions of the IAD investigator in terms of the truth of the matter, and I recognize that no matter how good the material is, it is not subject to cross-examination. But this material gives me the words of the witness. Furthermore, the officer has to answer the questions posed and the material cannot be used in another proceeding. The material can only be used for purposes of discipline in the department. I would have taken the IAD report.

John Kagel: For the same reasons I said earlier: there is no cross-examination here. It is more interesting because they at least have tapes so you can have some view of the circumstances surrounding the testimony. I still would be very uncomfortable having this as evidence per se which is being offered because it's not the same as having a live witness saying that X said something. At least you can cross-examine as to the circumstances and evaluate whether the person was evasive, whether he went without food for 6 hours, or whatever the circumstances may have been.

Ira Jaffe: So, you call them in for the 17th time after they've testified at each of the criminal trials and the civil trial and the investigation?

John Kagel: If somebody wants them there.

Kathleen Miller: I'm going to stick to the position I held in the earlier case. I would admit them but not for the truth of the matter asserted. It doesn't make a lot of difference that in this case the information appears to be more complete. They are not summaries. They are reports of interviews and tapes of interviews. Still, I cannot view someone else cross-examining this person even if it isn't in the context of my arbitration. To me the failure of having the opportunity to cross-examine is huge.

Ira Jaffe: So if they offered the transcript testimony from one of the criminal or civil proceedings, even though the union might not have been a party, but somebody else was fulfilling the role of cross-examining, that's enough to take it for the truth?

Kathleen Miller: Normally such testimony is offered for impeachment purposes, and I would allow that. But I don't know that I would accept any comment made outside my proceeding for the truth.

Victoria Hedian: Whatever happened to good old arbitration hearsay?

Shyam Das: I think that depositions or transcripts are different from this IAD report. The statements in the IAD report are more like an affidavit than a deposition or transcript. If you are going to allow an affidavit in for the truth of the matter, then I think that you would allow statements in the IAD report. But, especially if the witness is available to be called, I wouldn't accept an affidavit in an arbitration hearing. A transcript of another proceeding, even if the union did not participate, at least overcomes some of the problems. You have somebody with a real interest in challenging the testimony of the witness cross-examining that witness, presumably in a criminal-type proceeding. Common sense tells me that it's fair to place some reliance on that.

John Kagel: I'm not helped at all by whether somebody else, somewhere else cross-examined a person. It's different: it's between the IAD investigators and the witnesses themselves. But were those witnesses subpoenaed? If so, by whom? Did they come? And if not, why not? Those are complicated factors that might change the way the report is going to be viewed.

Ira Jaffe: Do you tell people that you're not taking it for the truth or do you simply say I'll take it for what it's worth?

John Kagel: I don't like to do that because nobody knows what it's worth to me when I say that.

Ira Jaffe: Sure. You may not even know until you hear the rest of the case.

John Kagel: Right. I try to stay away from that unless I just have to placate somebody who insists on putting something in, whether they should or not. I think that "taking it for what it's worth" leads to uncertainty. The parties shouldn't be left in a vacuum about whether you take this or don't take this. There's a lot that can be done within the context of the hearing to speed up the hearing, to truncate it, or not have a person testify all the way through for the 95th time. One way is to ask what the parties are really contesting here. The arbitrator then can admit what is not really contested but is agreed to. This way, the arbitrator can encourage counsel to focus on what it is that the arbitrator needs to know and what they have to contest. Then you can zero in on that, so that a lot of this material will come in if you use that kind of technique just simply to speed up the presentation.

Shyam Das: In my experience, in a number of cases where the police officer has been disciplined following an incident of domestic abuse, what typically happens is that after the officer has been disciplined and subjected to criminal charges, the complaining party refuses to testify or has no memory of anything. In the criminal cases, the charges are usually dropped. When you come to an arbitration hearing, you've got the statements in the IAD report from this witness saying all kinds of things, but the witness won't show up at the hearing. Are you going to give weight to that witness's statement? I agree with John. I think we should not waffle on that at the hearing. If we are not going to take the statement, we ought to say so.

Willis Goldsmith: I don't do anything in the public sector but it seems to me that this must come up in every single case. If the IAD report exonerates the police officer, the union wants it in and, presumably if it implicates him, the employer wants it in. Is there an understanding that it will or won't come in to obviate this problem?

Shyam Das: My understanding is that the union will make the objection, noting it is not objecting to the entry into the record of the IAD report as simply part of the administrative proceeding in the case. But, to the extent that any parts are hearsay statements, they should not be taken for the truth of the matter. The other side usually does not challenge the union's offer to admit such a report on those terms.

John Kagel: It becomes more complicated. Even if the statements contained in the report are not used to prove whether or not the officer did what was claimed, higher authority says that he or

she relied upon the IAD report for the degree of discipline. That adds a whole further nuance to this discussion which, fortunately, is not in the hypothetical.

Ira Jaffe: Why don't we move to another question, changing the fact pattern slightly. Assume that criminal charges against the grievant are still pending at the time of the arbitration and assume further that these parties don't postpone the arbitration. When you come to the hearing, you are given a motion by the department to put the discharge case on hold. Would you postpone? Would you postpone if the union made the motion? [Everyone was in favor of postponing.]

Ellen Alexander: You've got two charges. Because one is based only on the criminal conduct, there is really not much choice here.

Ira Jaffe: Are you postponing because you need the ruling to determine just cause based on the statement of charges or are you postponing because the officer has certain rights that should be protected in terms of the criminal process or both?

Ellen Alexander: Both.

Ira Jaffe: Would you raise it as an issue if neither party does?

Suppose the youth that sued the city and has complained about having been wrongfully shot doesn't come to testify. This group has not admitted a lot of the hearsay. Should an adverse inference be drawn against the city if it did not attempt to subpoena the youth for the hearing? Arbitrator Alexander is the only dissenter.

Ellen Alexander: The youth is the source of the charges. In my midwest police department appointment, management has to show you their efforts to make the witness appear. If you've got a witness who is not available and the charges are essential to this, I'm going to draw an adverse inference.

Kathleen Miller: I would need more facts to answer this question responsibly. There are a lot of potential reasons why this young man might not want to appear and testify, including that he was shot eight times. I would want more information before I drew an adverse inference.

Willis Goldsmith: Despite his having been shot eight times, it seems to me that he has likely been all over the press, he's filed lawsuits, he's testified in lawsuits, he's been everywhere. He's no shrinking violet. I do not understand why so many of you would be reluctant to draw an adverse inference.

Shyam Das: There is a question of proof. Without the witness's testimony, I'm not sure there is any.

Ira Jaffe: To be honest, I didn't expect that the clear weight of authority on the panel would be to keep out so much hearsay. It doesn't comport with my usual experience.

Kathleen Miller: As I understand this panel's view, if this youth either refuses to testify or does not testify this would not be held against him, even if he has been invited and efforts have been made to get him there.

Ira Jaffe: That's the ruling even if they can try to compel the testimony. The IAD report certainly contains his statement along with all sorts of other hearsay, whether it's trial testimony or allegations in the complaint. And this arbitration is but one of a half-dozen proceedings going on around this incident.

John Kagel: If the IAD investigator came to the hearing and testified that he interviewed the kid and related what the kid told him, that's different from simply putting in a statement. I do not know whether the panel would keep that out.

Ira Jaffe: Isn't that weaker hearsay in terms of reliability than an official statement taken in the course of a police investigation?

John Kagel: I don't know. That's why I think you should poll the panel. I would probably let that in because the investigator could be cross-examined. If there's an objection to that, I would say I think you should talk to the legislature because I think that kind of testimony is admissible whether you want it in or not.

Ira Jaffe: So we've come full circle. If the IAD sergeant gets on the stand and testifies to the accuracy of the report in his or her investigation, you let it in for the truth and then it's a question of weight.

John Kagel: That's right because that's what the law says you're supposed to do.

Ira Jaffe: I think that's different than where we were a few questions ago. I don't have any problem with it.

Andrew Strongin: I don't assume that the youth is failing to testify as a matter of his own choice. One of the parties may be reluctant to call him. I don't know what facts are going to be in dispute. The investigation has already turned up four spent shells from a weapon that bore his fingerprints. I'm not sure what he's going to be able to tell you that would make it worth putting that kind of an actor with that kind of a record on the stand against an officer who's got 50 citations for valor.

Ira Jaffe: And then you have a multimillion-dollar civil judgment on appeal.

Andrew Strongin: That may be, but if he is put on the stand by the police department, he may be credited in a way that either the city or the union does not want.

Ira Jaffe: Let's shift to questions about the potential role of private counsel in the arbitration hearing. Let us assume that counsel for the grievant in his criminal or civil proceedings shows up and the union's counsel in the arbitration graciously designates private counsel as co-counsel in handling this grievance. The city goes ballistic and objects. Do you allow that attorney to participate as counsel in the arbitration? The panel votes a unanimous yes!

Victoria Hedian: My view is that if either side objected to nonparty individuals being present at the hearing—husbands, wives, attorneys, or whatever—they shouldn't be there, and I might privately encourage my employer counterpart to object to this attorney being present. If the union has designated the attorney as co-counsel, he or she is now a representative who is entitled to participate and stay, although I have serious qualms about doing that.

Willis Goldsmith: How will this affect the hearing? How do you determine who asks questions of witnesses, who's going to make objections, and so forth? I think there should be a discussion between union and employer counsel prior to the hearing to establish the ground rules. I understand that you ruled unanimously that independent counsel could participate as co-counsel, but I think you have to be more vigilant than usual in managing the hearing.

Mei Bickner: I've had many situations where the private counsel was present and where the union did not object. I have not had a situation where the union designated counsel as co-counsel. In my hearings, the private counsel is permitted to remain, but does not participate in any way. He or she is aware of what transpired in the hearing room and if he or she wants to confer with the client, may do so. Under these circumstances, there are no problems about who would ask questions and so forth.

John Kagel: It does happen with, unfortunately, some increasing frequency. The way you control the procedure is to say only one counsel per witness. If you get someone who can't restrain themselves, the arbitrator has to do it.

Ira Jaffe: In the interest of time, I would direct your attention to question 10c, which asks whether you would give significant weight to an answer filed by the department in the civil suit denying the

claim of the young man that Sergeant Johnson acted improperly or used more force than was necessary. All but one member of the panel would not give the answer significant weight.

John Kagel: Did they verify their answer?

Ira Jaffe: You can assume it's a verified answer.

Shyam Das: I'd certainly admit the answer and give some weight to it, but, taking into account the realities of the situation, I wouldn't give it significant or preclusive weight.

Ira Jaffe: So you let it in but it's not binding?

Shyam Das: I don't know how you keep it out. It's a perfectly valid argument.

Ellen Alexander: The city is answering specific allegations. If we've got the complaint, then put in the answer. But the key is not to give it significant weight. We all know that no municipality is going to admit that its officer used excess force.

Ira Jaffe: John, you're the only green light!

John Kagel: Because it is verified, I would let it in and then watch the dance to see how the city is going to get around it. You can't mess around with what you say in court and if you go into court you better mean what you say. Obviously the city has a terrible dilemma, especially if they have $48 million on the line. Nonetheless, at some point the city has to become serious about what its claims are or are not. I would look very seriously at a document like that if somebody swore to it.

Willis Goldsmith: Isn't the devil really in the details? You have to know all of the facts that are alleged in the complaint, exactly what's said in the answer, the affirmative defenses, and how all of these square up with the issues in the arbitration case. Preclusive is a very strong word.

John Kagel: I don't think it would be preclusive. But if the answer represents sloppy pleading that admits or denies more than it should, I think the city is going to have a problem. The city is going to have to deal with this problem.

Willis Goldsmith: What if the answer is just a general denial and you don't know what is really denied?

John Kagel: In that case the argument obviously has less force.

III. Case #3: Education

Editor's Summary: Charles Butler has taught mathematics in the same suburban school system for 14 years and has also coached the varsity girls' basketball team at the middle school. Within 2 years,

he was accused of two sexual assaults. The first concerned a female basketball player whose parent accused him of inappropriate touching. The police investigated the charge and found no probable cause. Mr. Butler accepted a transfer to the high school in order to assuage the parents, but the next year he became involved in another case that concerned a high school student he had been helping in one-on-one sessions. Her parents, accompanied by an attorney, complained that he had fondled their daughter. Mr. Butler was suspended pending investigation. The police investigation concluded that there was too little evidence to go forward with a criminal complaint. Because this was the second complaint in 2 years, the board of education determined to discharge him. The letter of dismissal did not state any charges for the termination. Mr. Butler denies ever touching the student. He has grieved the discharge and has filed a lawsuit against the board of education.

Victoria Hedian: The union moves to dismiss this proceeding. The board of education has violated the grievant's constitutional rights to due process. Under the leading Supreme Court case, *Cleveland Board of Education v. Loudermill*,[1] public employment is a property right. Before the employee is deprived of it, he is entitled to three things: oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Here we have the vaguest of statements in the suspension notice—allegations of impropriety with a student. We have nothing at all in the discharge letter, no explanation of what the evidence was, and no opportunity to be heard. None of the three requirements of *Loudermill* was met. The board of education has made a mockery of this teacher's rights and destroyed his life on the flimsiest of charges. The case must be dismissed.

Willis Goldsmith: One of the most serious charges that can be made against a teacher is that the teacher has engaged in sexual misconduct involving a student. Just to speak to one of the points that opposing counsel noted—the claim that the teacher didn't know why he was discharged and that this somehow creates a due process violation flies in the face of reality. Mr. Butler knows exactly why he was disciplined, he knows the basis for the board of education's decision, and he knows precisely why this proceeding

[1]470 U.S. 532, 1 IER Cases 424 (1985).

is going forward. There are no magic words required in a letter of reprimand. There is no due process issue at all.

The real issue is what this man did. We believe that we can establish that he engaged in sexual misconduct toward the student involved. We have a clear and important obligation to our students and to our community to see that the kind of people who engage in this kind of conduct are no longer employed as teachers in our schools.

Ira Jaffe: Do you grant or deny the union's motion to dismiss the proceeding? [Everybody denies it.]

Victoria Hedian: I think the employer still has to say why the person was fired. You cannot simply point to the climate or the publicity or the distastefulness of the accusation. How can you respond if you don't know exactly what you ought to respond to?

Andrew Strongin: Is that standard any different for the employer than it is for the union who simply says no just cause?

Victoria Hedian: The employer has the burden here.

Mei Bickner: I think it's important to have the reasons stated. I had a case once where a teacher was terminated for child abuse and it turned out that the student was very unattentive, that she had been warned many times in a dance class to pay attention, and the teacher threw a set of key rings in her direction to grab her attention while she was talking. Unfortunately, the key ring accidentally grazed the student's chin. That was a factual situation that led to a termination for child abuse. I think the reason for the termination is important. Had they terminated her for something else, such as unprofessional conduct, the case might have been different. The reasons are important.

Ira Jaffe: Let's turn to the question that concerns the admissibility of evidence pertaining to the basketball player incident. Here we had two instances of alleged inappropriate touching or conduct in a 2-year period. With regard to the basketball incident, there was no proof that anything improper had occurred and no discipline was taken, although the employee voluntarily moved to another school, which was part and parcel of the deal. Now after the second incident, the board wants to litigate the allegations surrounding the first incident. Do you allow the introduction of the evidence over the union's objection? [The panel votes unanimously to deny the admission of this evidence.]

Does it relate to the credibility of what took place with respect to the triggering incident?

Victoria Hedian: It never happened, it's dead.

Ira Jaffe: The case has received a lot of publicity. The union requests that a protective order and gag order will be applied to the arbitration to prevent further damage to the teacher's reputation and good name. The board opposes such a preclusive order, particularly in light of a local sunshine law. Do you grant the union's request?

Andrew Strongin: I don't like to do things that I can't enforce. I don't know how in the world I can tell the parties what they can say and what they cannot say. I would be curious to know what the contract says, if anything, about this sort of thing. I think I might walk out in the hallway with the advocates and have a conversation about what's going on.

Ellen Alexander: I understood this gag order to apply only to our hearing and the witness in front of us. If we have control over the hearing, I think we can impose a gag order as it affects the testimony that is before us, in our own jurisdiction or forum. We certainly can't enforce it outside the arbitration. I don't think sunshine laws would have any effect because collective bargaining procedures are generally not covered.

Ira Jaffe: Where does the authority to impose either a gag order or protective order come from?

John Kagel: I think it's inherent in the proceedings. We probably do it all the time. We get items such as medical or incarceration records on people and we've simply asked or said that nothing should go beyond the room. I agree with Andrew that we don't have any authority to enforce a gag order. But if you have a fair procedure, you must try to make it as fair as possible.

Ira Jaffe: What do you do if it's deliberately violated? The next day you pick up the morning paper and counsel representing one side is interviewed extensively by the newspaper.

Andrew Strongin: That's the problem—the question was not can it be granted, but should it be granted? My view would be that this hearing is an extension of the bargaining process and I'm not going to get in the way of how the parties choose to bargain with each other. They've got to regulate themselves. I'm there to deal with one dispute. I'm not going to tell either of them what they can say or can't say.

Ira Jaffe: Would you keep the press out of your hearing?

Andrew Strongin: Oh, yes.

Ira Jaffe: And the basis for your authority to do that is?

Andrew Strongin: Private matter.

Ellen Alexander: Collective bargaining is exempted under sunshine laws. I just had a very experienced counsel argue that point to me.

Willis Goldsmith: What would be the point of a gag order here? The matter has already gone public. Why get involved in all this? The answer to the union's request is that it's too late for all of that—just keep it all in and see what the evidence turns up.

Ira Jaffe: Conceivably the shoe could soon be on the other foot. The hearing could conceivably get into psychiatric testimony on the complaining student or some other personal information that might call into question the complainant's credibility.

Willis Goldsmith: That's different from a gag order though. You can have a protective order, as to certain pieces of evidence, but to have a global gag order seems to be way over the top. I don't know what the sunshine law states here.

Ira Jaffe: I'm assuming this panel will treat the hearsay in terms of the student complaint the same way we've treated the hearsay in terms of all the other complaints. Let's move on to the question about whether the student should be permitted to have her parents present at the hearing. The vote was five to one to permit the parents in the room.

Victoria Hedian: The union is attempting to keep the parents out of the hearing. We do not think the parents should be permitted to come for several reasons. First, because the student is not of tender years. She is a senior in high school, 17 or 18 years old. Second, because we are going to move for sequestration. And finally, and probably the most important reason is that the parents being in the room may be an impediment to her testifying truthfully and objectively. She may have told them a story which she feels compelled to keep repeating which, if they were not in the room, she might change.

Willis Goldsmith: I would respond by saying that the notion that a grievant might feel compelled to keep repeating a story that he's told to somebody else would not be shocking to me whether the parents or anybody else was in the room. Under the circumstances here, these kinds of sexual misconduct cases are really quite difficult and, while 17 or 18 is not 7 or 8, with appropriate protections imposed by the arbitrator and the parties willing to abide by those protections, I wouldn't see any harm.

Ira Jaffe: As a wrap-up I am going to pose a few focused, brief questions. Assume that this is the high school senior. The union

moves to have the parents excluded from the hearing. Do you grant the motion to exclude? Here the panel is evenly split with three votes on each side.

Andrew Strongin: They get to stay but they have to testify first.

Ira Jaffe: The parents aren't testifying at all.

Andrew Strongin: If they're witnesses, they have to testify first. If they have to testify first and are present when the daughter testifies, they don't get to come back on the stand, at least not if called by the union.

Ellen Alexander: It is certainly possible that because your parents are there, you have an added incentive to stick with your story. The grievant here is almost an adult. I don't think the parents have the right to remain.

Andrew Strongin: Isn't the whole notion of sticking to the story a red herring? Why is this case different from anyone sticking to the story, because he's the grievant's friend or because he's part of the union or a management official or whatever?

Kathleen Miller: I had a case last year where a grocery store employee was discharged for allegedly sexually assaulting one of his co-workers. She was a 17-year-old senior in high school, much like the complainant in this case. She was very emotional and wanted the union to move to permit her boyfriend, not her parents, to be in the room while she testified to provide moral support. He didn't get into the room any more than these parents would.

Ira Jaffe: What if the child were really young, 6 or 7?

Ellen Alexander: Many years ago, I had two 6-year-old girls accuse their elementary school teacher of fondling them while he encouraged them to sit under his desk. I allowed the parents to stay in the room at that one.

John Kagel: I might do it but I might have them sit behind the daughter so that they could not signal.

Ira Jaffe: And do you keep the student away from the grievant by way of a remote TV hookup if it's requested, or does the grievant have the right to go ahead and truly confront his accuser.

Ellen Alexander: Grievant gets to confront his accuser.

APPENDIX: CASES TO ACCOMPANY THE TRUTH OR CONSEQUENCES PANEL DISCUSSION

IRA F. JAFFE

The session will examine procedural and substantive issues that often arise in cases involving discipline for alleged verbal and/or physical abuse in four different settings—law enforcement, education, health care, and customer service employment. Differences in the nature of the job and the nature of the alleged victims, industry custom and practice, and other matters often result in somewhat different approaches being taken by parties in the presentation of evidence and by arbitrators in evidentiary rulings and decisions. The underlying facts for each hypothetical scenario follow.

Case #1: Health Care

Helen Carter is a Certified Nursing Assistant (CNA) at the Jefferson Nursing Home. She has worked as a CNA at the facility since 1988. She has no prior disciplinary record and has always been considered a good employee by home management. The patient population in the home consists primarily of older patients who have difficulty with one or more life functions.

On June 1, 2001, Carter is scheduled to work 7:00 a.m. to 3:00 p.m. She enters Room 604, which is a room containing two beds. One bed contains Patient A, an 86-year-old incontinent man, who suffers from severe Alzheimer's. The second bed contains patient B, a 42-year-old male who is a long-term patient and who has been in the home since an automobile accident a year earlier left him paralyzed from the waist down.

Carter and another CNA, James Smith, are working together in Room 604 to roll Patient A, to change the bedding, which had become soiled, and to clean Paient A. While they are in the process of performing these tasks, A shouts out as if in pain and strikes out with his arms and legs, kicking Carter in the abdomen and striking her arm with his. He also screams a racial epithet and spits on Carter.

Patient B claims that, at that point, he watched Carter push A's leg back on the bed, bending it, to which A grimaced in pain and shouted "ouch," slap A's hand, and place her hands on the sides of

A's head and forcefully shake A's head back and forth, telling him in a loud and forceful tone of voice that he should "never, ever do that again." B claims that he heard, as well as saw, Carter slap A's hand.

Patient B reports the matter to Gail N. Knight, R.N., when she next attends to him several hours later. Nurse Knight relates the matter to the Charge Nurse, Gladys Day, R.N., and the Administrator, Felix Lyon. Nurse Knight prepares an incident report form on the afternoon of the alleged incident memorializing the comments from B.

Charge Nurse Day calls Carter and later Smith into the office as part of her investigation. When Day says that she wants to speak to Carter about her treatment of one of her patients, Carter asks if she needs union representation. Day ignores the comment and advises Carter that she has received a complaint that she (Carter) abused A by slapping his hand and forcefully shoving his leg, and by yelling at him and shaking his head. Carter denies the charges in their entirety and asserts that while she was changing A and his bedding, A lashed out and kicked her and tried to slap her. Carter notes that she has regularly cared for A for 4 years and that this type of behavior is not uncommon for him and she is used to it. When asked by Day, Carter is unable to provide an explanation as to why anyone would make up such a charge, but asks who made the false charges against her. Day does not respond.

Charge Nurse Day then calls Smith into the office. He admits being in the room to assist Carter, and denies having seen Carter slap or abuse A. He states further that he was offended by the actions of A, particularly the racial epithet, but said that Carter explained that A was "out of it" most of the time and should be ignored.

The home's administration determines that they are obligated to report the charge to the State Health Care Agency (SHCA) with jurisdiction over licensure of nursing homes and licensure of CNAs.

Carter is suspended indefinitely without pay and pending investigation. The SHCA sends an investigator to the home. The SHCA determines that the proof of abuse was insufficient and takes no action against the home or against Carter.

The home determines to return Carter to service when it receives the SHCA determination 1 month later, but declines to award her back pay. The home maintains that (1) it was entitled to

suspend her while the investigation was proceeding, and (2) the credible evidence of abuse warranted the imposition of a disciplinary suspension.

A grievance is filed on the date that Carter receives the home's determination. The matter is thereafter timely appealed to arbitration.

Questions

1. Prior to the hearing, the arbitrator receives a request from the union to execute a subpoena ad testificandum seeking to compel testimony from Patient B. In accord with the arbitrator's usual practice, the subpoena is executed and copies are provided to the other side. The arbitrator is then served with a motion to quash the subpoena, filed by the home. The motion identifies B as a patient at the home who is paralyzed from the waist down and cites a provision of the agreement that states: "The Arbitrator is precluded from drawing an adverse inference from the Employer's failure to call a patient or a member of the patient's family at the arbitration hearing."

   Following argument in a conference call with both advocates, do you quash the subpoena?
2. Would you quash the subpoena if the facts were such that the complaint against Carter came from Smith and it was Patient B who was offering a version of events that exonerated Carter from any wrongdoing?
3. If the SHCA prepared a report of its investigation, including summaries of witness statements and findings, and if that report were offered by the employer, would you allow the report to be entered for the truth of the matters contained therein?
4. If the SHCA report had found Carter guilty of verbal and/or physical abuse and if it were offered by the employer, would you allow the report to be entered for the truth of the matters contained therein?
5. If Charge Nurse Day is called by the home to testify about the hearsay complaint of B, do you accept the testimony for the truth of the matter?
6. If Nurse Knight is called by the home to testify about the hearsay complaint of B, do you allow the testimony for the truth of the matter?

7. At the arbitration, the home offers evidence of six prior incident reports that alleged verbal and/or physical abuse of residents by Carter. Those reports span virtually her entire period of employment (13 years) and include one incident report that post-dated her reinstatement. None of those incident reports resulted in any disciplinary action.

   The agreement contains language that provides that: "After two (2) years, all discipline will be expunged from an employee's record and may not be considered by the Employer for disciplinary purposes."

   Do you sustain an objection by the union to the incident reports?
8. If the last Incident report—that is, the post-reinstatement Incident Report—had resulted in discipline (a written reprimand), would you allow evidence concerning that incident report and the events that led to its issuance?
9. If neither party calls Smith, do you draw an adverse inference based upon the failure to call him?
10. After Nurse Day testifies regarding the decision to credit the statement of Patient B, the union attempts to elicit testimony regarding the medications taken by B and his medical and psychiatric history. The employer (a) replies that such matters are privileged under applicable state and federal law, including HIPAA, and (b) instructs Nurse Day not to answer the questions. Is there a valid privilege against disclosure of this information?
11. If you sustain the claim of privilege, do you grant a union motion to strike the hearsay statements of Patient B?
12. Does the pendency of an investigation by the SHCA provide just cause to suspend Carter indefinitely?
13. If the grievance is filed immediately upon Carter's being indefinitely suspended and the arbitration hearing is scheduled for a date before the SHCA issues its report, do you grant a motion by the employer to postpone the arbitration until after the SHCA report has issued?
14. In determining the question of just cause for discipline, did you place great weight in the determination of the SHCA that insufficient evidence existed to warrant a finding of abuse?
15. If the SHCA, after investigation, determines that abuse did occur, do you view the issue of proof
    a. de novo?

b. granting the SHCA finding preclusive effect?
c. with a rebuttable presumption of correctness?

16. Is the discipline invalid because of a violation of the rights of Carter to union representation in the initial investigatory interview?
17. Based upon the original facts, do you uphold the suspension?
18. Based upon the original facts, would you have upheld a discharge if that had been the action taken by the home?

Case #2: Police

The grievant, Charles "Rambo" Johnson, has been a police officer in a large city since 1980. After 8 years, he was promoted to the rank of corporal. After another 5 years, he was promoted to the rank of sergeant. He has been highly decorated for valor 50 times over his career.

While returning home from dinner, Sergeant Johnson (who is out of uniform and walking down the street) sees a youth on the street carrying an automatic weapon. Johnson is unable to determine the age of the youth, who is later determined to be 14 years old. Johnson claims that he identified himself as a police officer and ordered the young man to drop his weapon. The young man denies that he received such a warning.

Johnson claims that the young man then fired at him twice. The young man denies having fired at Johnson. Johnson fires at the youth with his off-duty automatic revolver. An ambulance is called. The young man lives but is paralyzed from the waist down after having been shot eight times.

A formal complaint is filed with the police department by several community groups. The matter is referred to the Internal Affairs Division (IAD) within the police department for investigation. The shooting, as well as the complaint, receives significant publicity in the local newspapers and on radio and television. Sergeant Johnson is Caucasian. The young man who was shot is African American. A march is held at City Hall seeking that Johnson be discharged from his position. This shooting is one of a number of police shootings with racial overtones that have occurred in recent years in the city.

During the course of the IAD investigation, (1) it is discovered that the young man is a member of a gang that advocates killing police officers; (2) four spent shells are recovered that IAD tests

and determines are from the weapon of the young man (his prints are also on the weapon confirming that it was his weapon); and (3) the grievant is interviewed and denies any wrongdoing.

The young man is charged criminally with unauthorized possession of a weapon, assault with a deadly weapon, and resisting arrest. He is tried as an adult and is acquitted of all charges by the jury. A formal complaint is filed on behalf of the young man with the police department. The matter is referred to the IAD of the police department, which conducts an investigation of the matter. Johnson is placed on administrative leave pending the results of that investigation.

Additionally, Johnson is sent to the departmental psychiatrist for evaluation, as is required by the provisions of the firearms directive whenever an officer discharges a firearm.

At the conclusion of the investigation, IAD issues a lengthy report. The findings are that the grievant failed to comply with the directive governing the use of firearms. Specifically, IAD has determined that the grievant used excessive force in continuing to shoot at the young man even after he dropped his weapon.

After Johnson has been on administrative leave for 7 months, he receives notice that he is being criminally charged with excessive use of force and assault and battery. Later that same day, the grievant is advised that he is being suspended pending termination for conduct unbecoming an officer (being arrested while off duty) and for violation of the department's firearms directive. The commissioner has routinely suspended and terminated officers for any off-duty arrests and, regardless of the outcome of the criminal proceedings, has only returned officers to duty when it is clear that they were wholly innocent of the charges. The notice of suspension cites the arrest of Johnson and his having shot the youth (with specifics as to date and time), and indicates that dismissal will be effective 30 days thereafter.

Pursuant to the published disciplinary code, a first violation of that directive may be punished by action ranging from reprimand to dismissal.

The grievant is provided the opportunity to reply, following issuance of his *Miranda* warnings, and declines to say anything upon advice of counsel. Johnson enters a plea of not guilty to the administrative charges. The matter proceeds to hearing before a Police Board of Inquiry (PBI), a board consisting of three officers (a sergeant, a lieutenant, and a captain). Johnson again declines

to testify due to the fact that criminal charges are still pending. No request is made to stay the PBI hearing, either by Johnson or by the department.

The PBI finds Johnson guilty of violating the directive on the use of firearms and recommends a 30-day suspension. The PBI recommendation is provided to the police commissioner, who decides to discharge the grievant. The Fraternal Order of Police (FOP) timely processes a grievance filed by Johnson to arbitration.

The young man retains counsel and sues both the city and Johnson on a variety of state and federal law claims. A jury awards the young man $48,000,000 in damages. A motion to set aside the verdict is granted and a new trial is ordered.

By the time that the matter comes to arbitration, Johnson has been found not guilty of the criminal charges by the court.

Questions

1. At the outset of the hearing, the employer asks if the arbitrator has read any of the newspaper or other press accounts of the matter or seen any of the televised coverage. When the arbitrator replies in the affirmative, a motion is filed to have the arbitrator recuse himself/herself. The other party objects and asserts that the motion is frivolous and done for the purpose of further delaying the resolution of this matter. Do you grant the motion?
2. The department offers into evidence the IAD investigative report as a business record, which includes written statements prepared by IAD officers and signed by certain witnesses, transcripts of tape-recorded interviews of certain witnesses, and conclusions of the IAD investigator regarding whether the charges were proved. Is the report admissible for the truth of the matters contained therein?
3. If the IAD investigator is called as a witness and attests to the truth of the contents, is the report then admissible for the truth of the matters contained therein?
4. If the criminal charges against Sargeant Johnson were still pending at the time of the arbitration, would you grant a motion by the Department to stay the arbitration until the conclusion of the charges?
5. What about the same motion if filed by the FOP?
6. If the criminal charges against Johnson were upheld, would you place preclusive weight in that determination by the court?

7. If the youth does not testify regarding the incident, should an adverse inference be drawn as a result of that refusal?
8. If private counsel for the grievant wishes to participate in the arbitration and counsel for the Union designates private counsel as "co-counsel" in this matter, must private counsel be permitted to remain and to participate in the proceeding?
9. If counsel for the young man seeks to be present during his testimony, would you allow his presence if objected to by either or both counsel?
10. Do you give significant weight to the following:
    a. the judicial determination of not guilty regarding the young man?
    b. the judicial determination of not guilty regarding Johnson?
    c. the answer filed by the department in the civil suit denying the claim of the young man that Johnson acted improperly or used more force than was appropriate?
11. Sergeant Johnson has been an excellent and aggressive officer during his more than 20 years on the force. He has an excellent arrest record. Out of the thousands of arrests made during that period, allegations have been made that he used excessive force in eight prior instances. They were each investigated by IAD and found unsupported. No action was taken. The department offers the IAD files. The union objects. Do you sustain the objection?
12. The city's case in chief does not include any eyewitness testimony. The union caucuses and states that there are civil charges still pending and that it would prefer not to have to call Sergeant Johnson to the stand, but that if the arbitrator is going to draw an adverse inference, then it will call Johnson. Absent such an inference, however, it has decided to rest. Do you advise the union to call Johnson?
13. Did the city violate Johnson's constitutional due process rights by the manner in which he was suspended and terminated?

Case #3: Education

Charles Butler has worked for a large suburban school system for 14 years. During that period, he taught mathematics at three

different schools. His initial assignment was at John F. Kennedy Middle School (1988–1999), a job that he obtained immediately after graduating from college at age 21. His next assignment was at George Washington Middle School (1999–2001). His final assignment was at Martin Luther King Jr. High School (2001–2002).

Butler also coached the varsity girls' basketball team at George Washington Middle School, where the team improved from a 5–8 to a 9–4 record and made the regional playoffs. When he transferred to Martin Luther King Jr. High School, he became the assistant coach of the varsity girls' basketball team.

During the 2000–2001 school year, the parents of a student on the George Washington team who had been moved from first string to second string complained to the principal that Butler had inappropriately touched her buttocks during a practice. In accord with the board of education's policy and applicable law, the matter was reported to the local police, who conducted an investigation and determined no probable cause to institute criminal charges. The police report revealed that none of the other students who were present in the practice corroborated the claimed touching or reported inappropriate contact from Butler.

To assuage parental concerns, however, Butler agreed to be reassigned to Martin Luther King Jr. High School. There he teaches geometry and calculus. One of the senior students in his calculus class, Christy Collins, had been having problems with calculus and was doing poorly. Collins is an honor student, with excellent grades (she has attained all As and only two Bs throughout high school) and good SAT scores. She is a motivated student and is applying to top-tier colleges. She also is active in various extracurricular activities and is a varsity cheerleader.

Like many other teachers, Butler offers to remain after school or during lunch to assist students who have questions or are having difficulty. In early October, Collins began spending two to three lunch periods a week and 1 to 2 days a week after school obtaining extra assistance. On some days, other students were present with Collins in Butler's classroom. On some days, Collins received "one on one" additional instruction. As a result of the extra work, her grades in calculus began to improve. She was soon running a high B to low A in the class.

In mid-December 2001, the parents of Collins called the principal and made an appointment to see him about an urgent matter. At the meeting, they brought an attorney and advised the principal that their daughter had just told them that Butler had fondled her

during two of the "one on one" sessions in November. They explained their delay in reporting the matter as due to two things: (1) their daughter had not said anything to them until 2 weeks before (4 weeks after the alleged incident), and (2) they wanted to speak first with an attorney. The attorney advised that he was prepared to file a civil action against both Butler and the board seeking a large amount of monetary damages under a variety of legal theories. During that meeting, the principal was also advised that Collins had obtained professional psychiatric care for trauma as a result of the incident.

Following the meeting, the principal contacted the board's internal security officer, who in turn began his own investigation and also reported the allegation to the county police, who began their own formal investigation into the allegation. Butler was immediately suspended indefinitely pending investigation. The written notice stated simply: "In view of allegations of impropriety with a student lodged against you, you are suspended indefinitely pending further investigation. This suspension will take place immediately and will include suspension from both teaching and coaching duties. You are directed not to report to Martin Luther King Jr. High School or any other school property until further notice."

Based on the report from the county police, the county attorney determined that there was insufficient evidence to go forward with a criminal complaint. The internal investigator also reached a similar conclusion, asserting that there was no confirmed evidence of any wrongdoing by Butler. When the civil action was filed, however, the newspapers publicized the allegations of the complaint.

Butler has steadfastly denied having touched the student or done anything improper. He is generally regarded as an excellent teacher and, following his indefinite suspension and the newspaper publicity, there was an outpouring of support in the form of letters to the board of education doubting that he could be guilty of such behavior.

In light of the fact that this is the second complaint in as many years involving allegations of sexual misconduct, the board determined to discharge Mr. Butler, notwithstanding the conclusion of the internal investigation and the investigation of the police. The letter of dismissal did not state any reasons for the termination but did advise Butler of his rights to grieve and arbitrate his termination.