Chapter 7

REMEDIES IN DISCIPLINE CASES

I. Impact of Delay in Determining Back Pay

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Managements and unions often take six to eighteen months to bring a discharge case to the arbitration table. Such delays place a special strain on an arbitrator who rules that a grievant is guilty of misconduct but that discharge is too harsh a penalty. The arbitrator, under this commonplace scenario, must then deal with the back pay issue, for which there is often no satisfactory answer. Let me explain.

Assume we are dealing with the typical "just cause" provision and a collective bargaining agreement that places no restriction on the arbitrator's authority other than the customary injunction against modifying or adding to the language of the agreement. Assume further that 12 months elapse between the discharge and the arbitration hearing.

If the arbitrator believes that the misconduct warrants nothing more than a written warning, then an award of full back pay is obviously appropriate. A strong argument can be made for the proposition that the arbitrator's remedy should mirror what the employer would have done had it properly evaluated the facts of the case. The employer would doubtless disagree with the arbitrator's evaluation of the facts but it could hardly disagree about the theory behind the remedy.

If, however, misconduct is serious enough to warrant a strong penalty, perhaps discharge, but the arbitrator nevertheless believes some lesser penalty is appropriate because of extenuating circumstances or a critical procedural failing on management's part, then what? The choices are unappealing. To reinstate the grievant without back pay, a result often embraced by arbitrators, would mean in effect a 12-month disciplinary suspension. The union

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could understandably complain that such an award would bear no reasonable relationship to the employer's normal disciplinary practices. On the other hand, to reinstate the grievant with 11 months' back pay in the belief that management, absent discharge, would have imposed no more than a one-month suspension, seems to turn the case "on its head." Such an award rewards the grievant, notwithstanding his or her serious misconduct. That would understandably be seen by management as a bad precedent, one that would not discourage irresponsible behavior.

This problem is plainly prompted by delay in getting the case to the arbitration table. Had the case reached arbitration two months after the discharge, the arbitrator could have—and probably would have—reinstated the grievant subject to a two-month suspension. The remedy problem would have been avoided. And, however unhappy the employer was with the decision, there would be no back pay and hence no windfall for the grievant. Such discipline would appear to be a fair response to the overall circumstances.

Of course, in many discharge cases, the misconduct is not as serious as the employer alleges or the mitigating circumstances are not as insignificant as the employer alleges. Some kind of discipline is appropriate, but not discharge. And the extremes of back pay, high or low, seem inappropriate. The arbitrator could of course "split the difference," adopt a mid-point in the money remedy. That is, reduce the discharge to a six-month suspension and grant six months of back pay. That kind of mechanical approach is such a transparent effort to please both parties that it would almost certainly end by pleasing neither. Once again, the delay makes it extremely difficult to fashion a remedy. Either the union will object to the suspension being too long or the employer will object to the back pay being too large.

My point is, of course, that the parties' delay is an enemy of sound remedies in discharge cases. There are several possible solutions to this conundrum.

First, if the arbitrator discovers in preparing the award that he or she is confronted by this remedy dilemma, then he or she could seek a meeting with the parties' representatives to discuss the matter. A frank discussion, with the arbitrator in a mediator role, might produce a settlement of the remedy issue. Or it might produce some alternate device for finding an appropriate remedy. My experience tells me that the parties can, when they wish, be more creative than the arbitrator in the search for a workable remedy.

Second, it would be helpful for the arbitrator to know the reason for the delay, particularly if one party alone was responsible. Whoever was responsible should not profit from the delay. That information could be elicited from the parties' representatives. However, that inquiry might also produce additional discord as each side suggests that the other was the cause of the delay. My guess is that any benefit from identifying who was at fault would be outweighed by the possible ill will generated by such a discussion.

Third, the arbitrator could simply remand the remedy issue to the parties in the hope that they could find a satisfactory solution. And the arbitrator might also, in such a remand, advise the parties that if they failed to agree, then they each were to submit a proposed remedy (i.e., the amount of back pay due the grievant) and the arbitrator will choose the one that is "more reasonable." The chances are that they will try to be sensible and that their numbers will not be too far apart, perhaps close enough to encourage a settlement. This approach, although rarely used, was enthusiastically endorsed years ago by Dallas Young, an Academy Member from Ohio.

Fourth, the arbitrator might be influenced by the personal traits of the grievant (e.g., whether he acknowledged his guilt, whether he was remorseful, whether he had a good employment record). In short, the extenuating circumstances that may have prompted the arbitrator to reinstate may also play a role in determining the amount of back pay to be awarded.

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Some parties, relatively few I believe, have responded to this remedy issue in an unusual way. They apparently were unhappy with the broad discretion exercised by arbitrators under a "just cause" provision. Hence, they negotiated contract language that bars arbitrators from modifying the penalty in a discharge case. Under that language, there are just two possible paths for the arbitrator—*either* the discharge was for "just cause" (grievance denied) *or* the discharge was not for "just cause" (grievance granted). The arbitrator has no authority to reduce the penalty from discharge to a suspension or a written warning. Where the ruling is that the grievant was guilty of misconduct but that discharge was too severe a penalty, there is no "just cause" for discharge and the grievant must be reinstated with full back pay.

This limitation on the arbitrator's authority has, in my opinion, resulted in decisions that are too harsh or too lenient.[1] I have affirmed discharges where, absent this limitation, I would have reinstated the grievant without back pay; I have reinstated employees with full back pay where, absent this limitation, I would never have granted back pay. Arbitrators are uncomfortable about surrendering any part of their equitable authority in a discharge case. However, we are obviously bound by the terms of the parties' agreement and we are sometimes required to reach a result that offends our "sense of justice." My hunch is that because of this limitation, more discharges are affirmed in arbitration than would otherwise be the case.

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One might ask why the parties agree to limit arbitral authority in this way. No one has advised me of their purpose in doing so. I can only speculate. It would appear to me that whenever arbitral discretion is so large that our awards become truly unpredictable, the parties' discomfort is bound to rise. A negotiated limitation on arbitral authority is one way of dealing with such unpredictability.

For example, in the early days of labor-management arbitration, the parties often insisted on a mutually acceptable "statement of the issue to be decided." That effort was based no doubt upon their anxiety regarding arbitral restraint, namely, our ability to identify the real issue in the dispute and not stray into other matters. The fact that such agreed-to "statements" are largely ignored today is surely a sign of the parties' comfort with our performance. But when that comfort is shaken by unpredictability, it is hardly surprising to see an attempt to rein in our discretion.

[1]Of course, the arbitrator is free to ask the parties to waive this limitation in a given case if he or she senses that the award, without such a waiver, may prove to be too harsh or too lenient.