

Arbitration Remedies

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Basic U.S. Approach

- An arbitrator serves as parties' designated "contract reader"
- An arbitrator is generally limited to the remedies authorized by CBA
 - Includes specific performance of the contract
 - Does not include the power to award damages

Make Whole Remedy for Successful Grievants

- Reinstatement
- Back Pay
 - Reduced by interim earnings
 - May include predictable overtime
- Value of Lost Benefits
 - Such as seniority and vacation accrual, health care expenses, pension contributions

Remedies for Partially Successful Grievants

- Reinstatement
- Partial back pay (i.e., less unpaid suspension)
- Or without back pay

Remedies Not Generally Awarded

- Statutory remedies
- Punitive and consequential damages
- Attorney fees

Cooper, Bognanno & Befort

- More Than We Have Ever Known About Discipline and Discharge in Labor Arbitration: An Empirical Study
- University of Minnesota

CBB Study

- Our study includes 2,055 published and unpublished awards
- Involving discipline and discharge
- Issued by 81 arbitrators
- Involving Minnesota public and private sector workplaces
- Over a 24-year period

Table 8.3 – Discharge Case Outcomes

	<u>Outcome</u>	<u>TOTAL</u>
	Uphold the Discharge	751 52.44
	Reinstate - Full Back Pay	283 19.76
	Reinstate - Partial Back Pay	149 10.41
	Reinstate - Without Back Pay	240 16.76
	Entitlement to Future Vacancy	9 0.63

Of Cases in Which Employer Sanction Reduced—Rationale for Reduction

(in percent)

Rationale	Percent
Mitigating Factors	76.69
Lack of Evidence	34.80
Procedural Faults	32.60

Most Commonly Invoked Mitigating Factors

Mitigating Factor	Percent
Good Work Record	32.60
Lack of Progressive Discipline	27.09
Length of Service	23.35

Most Common Due Process Reasons for Penalty Reduction

Due Process Reason	Percent
Lack of notice of disciplinary consequences	31.13
Disparate Treatment	28.79
Inadequate Investigation	15.56

Thryv Decision

- Board is not limited to remedies of reinstatement and back pay in ULP cases
- Board also can make whole affected employees for other “direct or foreseeable pecuniary harms” suffered as a result of ULP

Question

- Can the *Thryv* principles be imported to the arbitration setting?

Different Sources of Remedial Authority

- For NLRA (ULP) Cases: Statute
- For Arbitration: Parties' CBA

For Arbitration Remedies

- CBA can dictate scope of arbitrator authority as to remedies
- CBA can **expand** remedial authority
- CBA can **limit** remedial authority
 - Example: Last Chance Agreements

Usual Remedies

- Similar “make whole” remedies typically available in both ULP and Arbitration settings
- If NLRB can interpret make whole authority more broadly, Arbitrators should be able to do the same absent CBA restrictions

Proposal: In absence of limiting CBA language as to remedies

- Arbitrators should presume usual make whole remedies are appropriate
- As in Thryv, make whole should include compensation for “direct and foreseeable pecuniary harms”
 - Such as medical and/or insurance costs
 - And legal expenses
- But not tort type or punitive damages

Potential Objections

- Seventh Amendment may preclude order for “punitive” damages in arbitration context
- Determination of “direct and foreseeable” pecuniary harms may be administratively complicated

Reasons to Follow *Thryv*

- It is well-recognized that arbitrators have broad authority to fashion make-whole remedies
- Some arbitration decisions already have directed remedies similar to *Thryv*
- It is not uncommon for arbitrators to retain supplemental jurisdiction to determine remedial issues

In re Arbitration between State of Illinois and AFSCME (2011)

- Union agreed to give up some CBA benefits in exchange for no layoffs
- State nonetheless laid off workers
- Arbitrator Benn finds violation & orders reinstatement and backpay, plus
 - Payment of medical expenses, and
 - Pecuniary losses resulting from foreclosures and evictions

Compliance Hearings

- Arbitrators may need to hold supplemental compliance hearing to determine remedies
- Burden on prevailing party to show
 - Those additional remedies that are either “direct” or “foreseeable,” and
 - The amount of the resulting pecuniary harm