Myths of Labor Arbitrations

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Merriam-Webster defines conventional wisdom ("CW") as "opinions or beliefs that are held or accepted by most people" or the "generally accepted belief, opinion, judgment or prediction about a particular matter." In the world of collective bargaining arbitrations, certain conventional wisdoms can be challenged. Consider the following:

I. CW: The widely accepted standard for the imposition of discipline under collective bargaining agreements is the famous "seven tests of just cause" articulated by Arbitrator Carroll Daugherty.

Traditionally, Daugherty's seven tests of just cause is articulated as a set of the following seven questions:

a. Was the grievant forewarned of the consequences for violating the rule/order?
b. Was the rule/order germane to the orderly, efficient and safe operation of the business?
c. Was the alleged rule/order violation investigated prior to issuing discipline?
d. Was the employer's investigation conducted fairly and objectively?
e. Did investigating "judge" finds substantial evidence of employee guilt, as charged?
f. Does the employer apply its rule/penalties evenhandedly and without discrimination?
g. Was level of discipline imposed reasonably related to the seriousness of the employee's proven offense and to the record of the employee's service?

Under the seven tests of just cause standard, a no answer to any of the seven questions will result in an arbitrator sustaining the grievance.

This conventional wisdom was the subject of a recent study[i] that sought to determine whether a significant proportion of all discharge awards issued utilized Arbitrator Daugherty's seven tests of just cause. The study examined 1432 discharge awards from 74 Minnesota arbitrators. The study also tested the premise: It the arbitrator utilized Daugherty's seven tests of

just cause standard to analyze the case record then the probability that the employer's discharge action will be upheld is reduced.

On this issue, the study concluded:

> … While Daugherty's Seven Tests are explicated in books, the focus of discussion at arbitration conferences, and a subject generally covered in arbitrator training programs, our research does not support the notion that Daugherty's rubric is "undeniably influential" or enjoys "widespread acceptance" in arbitral just cause decision-making. Our findings revealed that only 7.5% of the discharge awards issued for arbitrator explicitly utilize Daugherty's criteria. Further, an arbitrator's use of the Seven Tests was not found to decrease the probability of employer success. (Underscoring added.)

II. CW: Arbitrators commonly "split the baby" rather than ruling for one side over the other.

The Cardozo study referenced above found that arbitrators sustained the discharge actions in 52.4% of cases and upheld the grievance in 19.8% of the cases, or in 71.2% of all cases. Decisions that can be characterized as "splitting the baby" were 17.4% where reinstatement was ordered but without back pay or 10.4% with partial back pay. The study's findings report that a strong majority of decisions either upheld or sustained the grievance.

The findings of the Cardozo study are similar to the findings of the American Arbitration Association (AAA). In one AAA study of 804 cases involving the construction industry, it found that 61% of the arbitration awards clearly favored one party over the other. Only 16% of the cases fell within the middle ground (41 to 60%) of the awards claimed. In another AAA study of 111 commercial arbitration cases, 19% of the cases were totally denied and 41% of the cases were awarded more than 80% of their claimed amounts. Only 7% of the cases were awarded the mid-range of 41 to 60% of the claimed amounts.[ii]

III. CW: Formal rules of evidence do not apply in arbitrations.

Formal rules of evidence, as recognized and applied in the judicial process do not generally apply in the labor arbitration arena. Labor

arbitrators apply relaxed rules of evidence. For example, hearsay testimony is often admitted but is not afforded as much weight as direct evidence which is subject to cross-examination or is otherwise corroborated. Evidentiary rules that recognize legal privileges such as the attorney-client, spousal, pastor-penitent or Fifth Amendment privilege against self-incrimination are commonly respected by arbitrators. Labor arbitrators determine the extent to which rules of evidence will be followed. Arbitrators are responsible to provide a fair, efficient and equitable process for the adjudication of arbitrated matters. Some arbitrators, perhaps because of their experience and background, may apply different levels of formality with regard to rules of evidence. Arbitrators who were former litigators or judges, for example, made more frequently follow more formal rules of evidence in an arbitration proceeding.

IV. Arbitration is a fast and cheap dispute resolution process.

Arbitration is faster and usually cheaper than litigation. However, increased legalization and formalization of the labor arbitration process is making the labor arbitration process slower and more expensive. Many believe that arbitrations are not as fast and cheap as they can and should be. Many factors contribute to increasing the time and costs associated with obtaining arbitration decisions. Such factors include scheduling delays caused by the busy calendars of advocates and lawyers, conflicting priorities of the parties, political considerations, case overload, time consumed to permit the writing of post hearing briefs as well as arbitrator delay in rendering decisions.

V. CW: There is no discovery in arbitration.

American litigation practices provide for an extensive discovery (production of documents, written interrogatories, requests for admissions, lay and expert witness depositions, independent expert examinations, physical examinations, etc.) Labor arbitrations generally have far fewer processes for such pre-hearing discovery. Collective bargaining agreements frequently are silent with regard to discovery procedures and obligations. Some collective bargaining agreements expressly provide processes and timelines for the exchange of information through the grievance step process. The statutory duty to bargain in good faith has been interpreted to require collective bargaining parties to provide

information during the grievance and arbitration process. Parties can enlist the assistance of the arbitrator to provide discovery and information exchange pertinent and necessary for the prosecution of a grievance matter this is commonly done during the pre-hearing stage. Parties can work with the arbitrator to determine what kind and how much discovery is appropriate for a given dispute. Arbitrators may differ on their views of how much discovery is permissible and appropriate. In this manner, a degree of discovery can generally be obtained in labor arbitrations.

The Federal Arbitration Act as well as the great majority of state arbitration statutes are also silent with regard to discovery processes available in arbitration. (Some states (including Hawaii) have adopted the Revised Uniform Arbitration Act (RUAA) proposed by the Uniform Laws Commission in 2000. The RUAA explicitly provides for wide scale use of litigation discovery procedures if permitted by the arbitrator. Most states that have adopted the RUAA have exempted collective bargaining arbitrations from the scope of the statute. A small minority of states (Hawaii among them) have not adopted a collective bargaining exemption. In those states, collective bargaining arbitrations are at risk of becoming increasingly formalized and litigation-like.)

VI. CW: <u>When management implements a "zero-tolerance" policy, discharge for violation of such policy will be upheld in arbitration</u>.

Collective bargaining agreements or product of mutual agreement. Management rights generally permits management to adopt and implement reasonable and appropriate rules for the work place. When management promulgates a policy, whether it is a workplace violence, anti-discrimination, sexual harassment or safety policy, often the policies implemented are by management without union concurrence.

Discharges for violation of zero-tolerance policies are not universally or automatically upheld in arbitrations. The facts and circumstances of specific cases will raise considerations that may move an arbitrator to overturn a summary discharge. Such facts and circumstances can include considerations of proper and adequate notice, the nature of the industry, provocation, justification and, the grievant's discipline and work history and other potential mitigating considerations.

[i] The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction, Mario F. Bognanno, Jonathan E. Booth, Thomas J. Norman, Laura J. Cooper and Stephen F. Befort., Cardozo Journal of Conflict Resolution, volume 16, page 153 (2014).

[ii] Splitting the Baby:A New AAA study. American Arbitration Association. Mar. 9, 2007.