employer needed the union's consent to add a signature requirement on top of what the contract called for.[120]

The Employee's Obligation. Just as management has an obligation to notify employees of the consequences of their misbehavior, so employees have an obligation not to impede the employer's efforts to communicate with them. On this basis an arbitrator found irrelevant the lack of warning of the consequences of walking off the job where the employee made such warning impossible by hanging up on his supervisor, leaving his phone off the hook, and then leaving his job.[121]

Progressive Discipline as Form of Notice

"Inherent in the concept of 'cause' or 'just cause' or 'proper cause' is the concept of 'progressive discipline,'"[122] which is not something for which the union must bargain.[123] Moreover, "inherent in the concept of progressive discipline is the idea that employees enjoy certain rights of due process and one of those rights is notice of problems on the job."[124] For all but the most serious types of misconduct (e.g., theft), progressive discipline functions as a graduated system of penalties for repeated rule infractions.

> *Arbitrator Duff:* The principle of progressive discipline requires that for the first minor infractions, verbal warnings be given to an employee. If the verbal warnings do not lead an errant employee to reform, and a repetition of the offense, or a similar infraction occurs, then more severe punishment should be imposed. Written reprimands place an employee on notice that heavier penalties will be imposed for future acts of misconduct. . . .
>
> Management's continued reliance upon a repetition of gentle verbal rebukes that were not effective did not adequately warn the Grievant that the Company would not continue to tolerate such conduct. . . . Prompt and adequate penalties should have been imposed . . . .[125]

[120]See *Springfield Sugar Co.*, 61 LA 639 (Blum, 1973), where the contract required only that rules be posted.

[121]*S. B. Thomas*, 92 LA 1055 (Chandler, 1989).

[122]*Southwest Elec. Co.*, 54 LA 195 (Bothwell, 1969).

[123]*Western Contracting Corp.*, 77-1 ARB ¶8004 (Laughlin, 1976) (negligence).

[124]*City of Thief River Falls*, 88-1 ARB ¶8111, 3541 (Ver Ploeg, 1987).

[125]*Armco Steel Corp.*, 52 LA 101, 104 (1960) (poor employment record).

A system of progressive discipline has two primary objectives. First, progressive discipline is a system of penalties for misconduct. Second, and equally important, progressive discipline serves to put an employee on notice that he must correct his behavior or eventually face discharge.

The second objective of progressive discipline was highlighted in a case where an employee was given an oral warning and a written warning and then was discharged, all on the same day, for three unexcused absences. The arbitrator held that the requirement of proper notice had not been met because such compression of the steps of progressive discipline gave the employee no chance to improve.[126] As Arbitrator Dawson has explained further:

> The concept of a warning implies an opportunity for correction. This in turn implies opportunity for sober reflection and in many cases resolves itself into a question of how much time has elapsed between the warning and the final discharge.[127]

Query: Does a progressive discipline policy always require a warning at the first step? "The answer is clearly NO," according to Arbitrator Oestreich, reflecting the general arbitral view.[128] If, however, the contract sets forth a rigid schedule of progressive discipline steps, management departs from the schedule at its peril. A case in point involved a school district that sent a letter to a teacher stating that "[f]ailure to observe any of these guidelines will result in discipline up to and including discharge." Progressive discipline was stated in the contract to consist of four steps—oral reprimand, written reprimand, suspension, discharge. Since no oral reprimand preceded the letter, the arbitrator reasoned that the letter was not part of progressive discipline but instead was an improper attempt to bargain individually with the teacher as to the matters in question.[129]

[126]*Rockford School Dist.*, 88-2 ARB ¶8367 (Traynor, 1987) (improper behavior by teacher toward student). See also, among many other cases, *Times Publishing Co.*, 40 LA 1054 (Dworkin, 1963); *Armstrong Cork Co.*, 71-1 ARB ¶8242 (Wolf, 1971); *Ohio Power Co.*, 64 LA 934 (High, 1975).

[127]*Standard Shade Roller Div.*, 73 LA 86, 90 (1979).

[128]*Pacific Bell*, 84 LA 710 (Oestreich, 1985) (negligence), citing FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 243 (2d ed. 1983).

[129]*Rockford School Dist.*, *supra* note 126. See also *Simplex Prods. Div.*, 91 LA 356 (Byars, 1988) (failure to send warning letters under progressive discipline policy showed company did not intend to apply notification rule).

Disciplinary Suspensions Versus Warnings Only

Progressive discipline typically begins with verbal and/or written reprimands and then, upon repetition of the same or a similar offense, follows up with a suspension or suspensions of increasing duration, culminating in discharge. Some systems of progressive discipline, however, consist of warnings only. Warnings-only systems have been used mostly in connection with absenteeism caused by illness, the theory being that such absenteeism cannot be treated the same as other violations of plant rules because illness is an involuntary condition on which suspension could not be expected to have a corrective effect.

Warnings-only policies, as well as the more familiar forms of progressive discipline, have been upheld in a number of cases.[130] However, from the particular standpoint of notice, many arbitrators have held that a system of progressive discipline that follows up oral or written warnings, or both, with at least one disciplinary suspension has several advantages over a system that relies exclusively on warnings and counseling.

Shows that the company means business. Time off without pay has the effect of unmistakably impressing upon the employee that the company is serious about enforcing its work rules. A suspension goes beyond an oral or written warning in that it not only serves notice but serves notice punitively, by depriving the employee of income.[131] Sometimes, as Arbitrator Teple put it, "talk and meetings simply are not enough and as the disciplinary procedures which include suspension in many industries indicate, an actual layoff may be necessary to bring the point home."[132]

[130]*Atlantic Richfield Co.*, 69 LA 484 (Sisk, 1977); *Union Carbide Corp.*, 46 LA 195 (Cahn, 1966); *Logan Metal Stampings, Inc.*, 53 LA 185 (Kates, 1969), in which the contract provided for a progressive discipline system, including a three-day suspension, for excessive absenteeism, but made an exception for absenteeism due to chronic illness. Other cases in which absentee control programs based on warnings only have been accepted include *Pacific Tel. & Tel. Corp.*, 32 LA 178 (Galenson, 1959); *Cannon Elec. Co.*, 46 LA 481 (Kotin, 1965); *American Brakeblok Div., Abex Corp.*, 52 LA 484 (Wagner, 1969); *Koenig Iron Works, Inc.*, 53 LA 594 (Ray, 1969); *Sterling Drug, Inc.*, 70-1 ARB ¶8033 (Berkowitz, 1969); *Jaeger Mach. Co.*, 55 LA 850 (High, 1970); *Globe-Union, Inc.*, 57 LA 701 (High, 1971); *Doxsee Food Corp.*, 57 LA 1107 (Farinholt, 1971); *Beaunit Fibers*, 71-2 ARB ¶8455 (Amis, 1971); *Avco Corp.*, 64 LA 672 (Marcus, 1975); *Husky Oil Co.*, 65 LA 47 (Richardson, 1975); *Hoover Ball & Bearing Co.*, 66 LA 764 (Herman, 1976); *Pacific Southwest Airlines*, 70 LA 833 (Jones, 1978).

[131]*General Tel. of Cal.*, 44 LA 669 (Prasow, 1965).

[132]*White Motor Corp.*, 50 LA 541, 544 (1968) (fighting). See also *Ryder Truck Rental, Inc.*, 82-1 ARB 8186, 3862 (Allen, 1982) ("sometimes a suspension will 'shock' an impish and sarcastic worker into the full realization of the dangerous direction in which his

Leaves an employee in no doubt as to where he stands. This point is closely related to the first. Warnings-only policies, especially when warnings begin to pile up for the same infraction, may foster a false sense of security.

> *Arbitrator Laughlin:* In the face of mere oral warnings, ignored and repeated and ignored again, an employee is likely to become convinced that he is immune from meaningful corrective action. The absence of penalties of increasing severity is tantamount to ignoring the numerous violations.[133]

Lays the foundation for "the straw that broke the camel's back." Even though an individual act of misconduct is not of such severity as to warrant summary discharge, it may be "the straw that broke the camel's back." It can only be the last straw, however, if the employee has been put on notice of a continuing problem and the prospect of more severe disciplinary action, including dismissal. A suspension achieves this, since it puts the employee on clear notice that he or she must shape up. Typically three conditions must be met in such cases: (1) there must have been a genuine "last straw" (i.e., a present offense must have been committed); (2) the grievant's overall record must be as bad as the employer contends; and (3) the requirements of progressive discipline must have been satisfied.[134]

More difficult to deny. When warnings are followed by suspension, an employee ordinarily cannot claim lack of notice about his pattern of misconduct or plead ignorance of the employer's intention to penalize continued misconduct with discharge.[135]

Warnings-Only System. A warnings-only system of progressive discipline can work if the employer takes special care to make sure that notice obligations are fulfilled. Within the context of progressive discipline in an absenteeism control program, for example, those obligations would be satisfied by telling the employee clearly and unequivocally at each step that he or she has failed to meet the company's attendance standard; what

attitude is taking him"); *Rochester Tel. Corp.*, 45 LA 538 (Duff, 1965) (use of obscene language); *Ohio Crankshaft Corp.*, 48 LA 558 (Teple, 1967) (insubordination, disruptive conduct); *Armco Steel Corp.*, 52 LA 101 (Duff, 1969) (overall misconduct); *Eastex, Inc.*, 69-2 ARB ¶8459 (Marshall, 1969) (absenteeism); *Wolf Mach. Co.*, 72 LA 510 (High, 1979) (absenteeism, other misconduct).

[133]*Western Contracting Corp.*, 77-1 ARB ¶8004, 3026 (Laughlin, 1976).

[134]*Mobil Oil Corp.*, 87 LA 837 (Koven, 1986) (insubordination).

[135]*Union Carbide Corp.*, 74 LA 681 (Bowers, 1980) (absenteeism).

standard must be met in order to avoid further sanctions; and, most critically, at what point further absences will result in termination.[136]

In cases where the employer's attendance rules do not provide for suspension as the step prior to discharge, one of the most common factors that have led arbitrators to reinstate grievants' has been uncertainty as to whether they were in fact on notice that their jobs were in jeopardy.[137] Such uncertainty can be avoided or at least minimized if a warnings-only system is defined in specific terms (for example, how many days of absence will bring an employee to each successive step) and clearly communicated to employees and the union (for example, by written notice, meetings, or whatever means are appropriate at the particular work site to bring home to employees that discharge will follow a final warning even if suspension is not imposed).

Many conflicts about whether notice was given can be avoided if the employer has a record showing that the employee received and understood the warning at each step (for example, a written memorandum of an oral counseling session, or the employee's signature on a written warning acknowledging its receipt). The union might also be sent copies of written notices, especially the final warning of termination.

The "Last Chance" Agreement

A special addition to progressive discipline is the "last-chance" agreement, an understanding among the three parties (employer, union, and employee) that no further misconduct will be tolerated. In a sense, such an agreement exists whenever the employee has been warned that further misconduct will result in discharge; but the last-chance agreement comes into being when the employee already has engaged in misconduct meriting termination and is being given one final opportunity to keep his or her job. In such cases, Arbitrator Dworkin has held, the usual just cause standards do not apply; the employee may be fired for even a trivial rule violation.[138] The employee

[136]E.g., *Phillips Petroleum*, 64-3 ARB ¶8907 (Mittenthal, 1964); *General Elec. Co.*, 69 LA 707 (Jedel, 1977); *Union Carbide Corp., supra* note 135.

[137]E.g., *Kaiser Aluminum & Chem. Corp.*, 68-2 ARB ¶8606 (Hebert, 1968).

[138]*Butler Mfg. Co.*, 93 LA 441 (1989) (absenteeism; insubordination); see also *Linde Gases of the Midwest, Inc.*, 94 LA 225 (Nielsen, 1989) (refusal to take alcohol test). In *Ohio Dept. of Highway Safety*, 96 LA 71 (1990), however, Arbitrator Dworkin ruled that a last-chance agreement was unreasonable on its face in holding the grievant's discharge "in abeyance" on condition that she complete a rehabilitation program and refrain from further drug or alcohol abuse, since it failed to specify an expiration date.

need not be given explicit notice when he or she commits the further infraction,[139] and no further progressive discipline is required.[140]

But even last-chance agreements have their limits. It may still be appropriate to take account of strongly mitigating circumstances. Take a case where the employee's unexcused absence was caused by a serious family emergency. The employee's pregnant wife had become violent, and the employee feared for the safety of his two children; he was unable to advise the company of his situation because his wife had ripped the telephone out of the wall. In this extreme case the arbitrator held that discharge was not justified, though he denied back pay on the theory that the company was not financially responsible for the employee's absence.[141]

A different kind of mitigation is illustrated by the case of an employee who was terminated for filing a spurious claim for overtime pay after he had received a "final warning" that any further violation of written or unwritten shop rules would result in his suspension or discharge. The arbitrator reversed the discharge because the employee had filed the claim in the belief that it was valid and without intent to defraud or steal. Absent a clear expression of the parties' intent as to the scope of the warning, he held, it was unreasonable to conclude that discharge was contemplated for the filing of an unacceptable overtime claim.[142]

III. Typical Notice Pitfalls

Written Notice or Oral—Two Common Failings

By its very nature, since it is designed to let employees know what they can and cannot do, a notice needs to be drawn with

[139]*Allied Maintenance Corp.*, 87 LA 121 (Duda, 1986) (work rules).

[140]*Champion Int'l Corp.*, 86 LA 1077 (Chalfie, 1986) (absenteeism).

[141]*Chicago Transit Auth.*, 89-1 ARB ¶8129 (Goldstein, 1988); see also *Food Marketing Corp.*, 88 LA 98 (Doering, 1986) (not clear employee fully understood implications of last-chance agreement).

[142]*San Francisco Newspaper Agency*, 93 LA 322 (Koven, 1989).

the elements of proof of that offense have been satisfied, the question is a closed issue, although confrontations may take place over whether in the particular circumstances the misconduct was serious enough to fit into the summary discharge category.[23] Modification of the summary discharge penalty can come about not by an attack on the appropriateness of the penalty itself but only if unusual mitigating circumstances can be proved. However, where an offense calls for something less than summary discharge, the subject of penalty remains very much open to discussion and inquiry.

Progressive Discipline

Conceptual Underpinnings of Progressive Discipline

A number of propositions are identified with progressive discipline. Underlying all systems of progressive discipline is the notion that a discipline and discharge program above all must be fair and just on both a substantive and a procedural or due process level. Arbitrator Platt has expressed another consideration as follows:

> [I]t is not socially desirable that disciplinary penalties for industrial offenses be regarded strictly as punishment for wrongdoing. Rather, the object of the penalty should be to make employees recognize their responsibilities so that they might become better workers in the future.[24]

Arbitrator Alexander developed Platt's point further:

> To draw an analogy from the criminal law, corrective discipline is somewhat like a habitual offender statute. It presupposes that the primary purpose of punishment is to correct wrong-doing rather than to wreak vengeance or deter others. Corrective discipline assumes that the employer as well as the employee gains more by continuing to retain the offender in employment, at least for a period of future testing, than to cut him from the rolls at

[23]*E.g.*, in *T. W. Recreational Servs.*, 93 LA 302 (Richard, 1989), the arbitrator rejected the employer's assertion that a bus driver was guilty of "gross negligence" in causing a one-vehicle accident that resulted in some $20,000 property damage and minor injury to a passenger. His analysis showed the driver to be guilty of at most simple negligence, an offense calling for progressive discipline; that the consequences were serious was irrelevant.

[24]*The Arbitration Process in the Settlement of Labor Disputes*, 31 J. Am. Judicature Soc'y 58 (1947).

> the earliest possible moment. . . . If a continuing level of employment is assumed, the discharged employee must be replaced by another. Normal hiring procedures provide little guarantee that the new hire will be a perfect citizen . . . .[25]

Another principle underlying progressive discipline is that the "punishment should fit the crime."[26] "[O]nce the misconduct has been proved, the penalty imposed must be fairly warranted and reasonably calculated to eliminate or correct the offensive conduct."[27] It has been emphasized that punishment should be based on the employee's actions, not on the consequences of those actions.[28]

But when rehabilitation fails, discharge can then follow.[29]

[25]*Concepts of Industrial Discipline*, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 79–81 (Proceedings of the 9th Annual Meeting, National Academy of Arbitrators 1956), cited in *American Int'l Aluminum Corp.*, 48 LA 283, 287 (Howlett, 1967). The rehabilitative purpose of progressive discipline is strongly emphasized in *Victory Markets, Inc.*, 84 LA 354 (Sabghir, 1985): "Progressive discipline is not simply an escalator to crucify an employee. Through it an employer must demonstrate an honest and serious effort to salvage rather than savage an employee. To hold otherwise distorts, demeans and defeats the goals underlying the concept of progressive and corrective discipline." See also *Bell Aircraft Corp.*, 17 LA 230 (Shister, 1951) (disrupting operations); *Rochester Tel. Co.*, 45 LA 538 (Duff, 1965) (use of obscene language); *Lawrence Gen'l Hosp.*, 55 LA 987 (Zack, 1970) (unsatisfactory performance); *Louisville Cooperage Co.*, 70-2 ARB ¶8652 (Volz, 1970) (draining untaxed whiskey out of barrels); *Armstrong Cork Co.*, 71-1 ARB ¶8242 (Wolf, 1971) (absenteeism due to alcoholism); *Ohio Power Co.*, 64 LA 934 (High, 1975) (dishonesty); *Warren Assemblies, Inc.*, 93 LA 521 (Roumell, 1989) (leaving post without permission), among many other cases.

[26]*R. E. Phelon Co.*, 75 LA 1051, 1053 (Irvings, 1980) (unauthorized absence) ("disciplinary penalty imposed must fit the seriousness of the offense"); *Grand Haven Brass Foundry*, 68 LA 41, 43 (Roumell, 1977) (threatening personnel director) ("parties have codified in their agreement a policy that the degree of penalty should be in keeping with the seriousness of the offense"); *Noranda Aluminum, Inc.*, 81-1 ARB ¶8091 (Ross, 1980) (taking coins from vending machine).

[27]*Capital Airlines, Inc.*, 25 LA 13, 16 (Stowe, 1955) (misuse of sick-leave privilege): "One of the primary purposes of discipline in the industrial relations field is to bring about improvement. It is, therefore, axiomatic that the degree of penalty should be in keeping with the offense, and should be designed primarily to bring about such improvement." See also *Bay Area Rapid Transit Dist.*, *supra* note 21 (cumulative misconduct).

[28]*T. W. Recreational Servs., Inc.*, *supra* note 23. The arbitrator reversed the discharge of a bus driver whose negligence resulted in some $20,000 damage to his bus and minor injury to a passenger. Discipline may be based on an unsafe act, he said, but not on the consequences of that act, which in this case he found to be ordinary negligence, not gross negligence. In a superficially similar case, *Celanese Trucking Div.*, 90 LA 819 (Nolan, 1988), the arbitrator upheld the discharge of a truck driver whose actions caused damage amounting to about $100,000. Although here, too, the arbitrator found only simple negligence, the driver had received counseling, several warnings, and a suspension relating to his driving practices, and this record persuaded the arbitrator to approve the discharge.

[29]See, e.g., *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler, 1988) (poor performance), where the arbitrator held that, if an employee does not respond to

The purpose of progressive discipline is not only the rehabilitation of the employee and the prevention of continued misconduct, but also "the protection of the right of the Company to sever completely its relationships with any employee who by his total behavior shows himself to be irresponsible."[30]

What Arbitrators Consider in Applying Progressive Discipline

This said, the question then becomes, how do arbitrators apply these foundational concepts of progressive discipline in practice? Is there some rhyme and reason, some pattern of reasonable expectancy, when an arbitrator reviews a penalty in which progressive discipline is in issue?

Arbitrators routinely experience a multiplicity of parties, histories, relationships, and situations, and as a consequence are called upon to review all kinds of disciplinary and penalty systems. Thus, what arbitrators look for where progressive discipline and penalty systems become an issue is what is appropriate in the particular situations that confront them—in other words, they take a pragmatic approach. When it comes to progressive discipline, arbitrators, like the leprechaun in *Finian's Rainbow*, tend to fondle the hand at hand.

Requirements of Contract Language. Considerations involving contract language are always likely to occupy center stage. If the contract expressly requires progressive discipline, an arbitrator

progresssive discipline, management "may conclude on a non-arbitrary or capricious basis, that rehabilitation is an impossibility and is then at liberty to dismiss the employee before all progressive disciplinary steps normally taken are concluded."

[30]*Bell Aircraft Co.*, 17 LA 230, 233 (Shister, 1951) (refusal to carry out supervisor's direction). According to Arbitrator J. Dworkin, discharge should be regarded as separate and distinct from progressive discipline. His reasoning, as set forth in *Red Cross Blood Serv.*, 90 LA 393, 397 (1988) (poor performance):

> Discharge and suspension are separate, distinct penalties. Suspensions are corrective measures, designed to rehabilitate a miscreant employee; to restore him/her to acceptable levels of production and/or behavior. Discharge, on the other hand, is the severance of an employment relationship. . . . In other words, discharge is designed to abolish the employment relationship; disciplinary suspension is designed to improve it.

The distinction may appear to be sophistry. However, the contract before the arbitrator specified discharge as the penalty for a third rule violation within a 12-month period. The grievant had committed three violations, and the employer argued that since it could discharge the grievant, it could suspend him for two months. The arbitrator rejected that argument, holding that the purpose of a suspension must be corrective and that a suspension of more than 30 days is punitive rather than corrective. He therefore cut the suspension to 30 days, "the longest conceivable period consistent with the Employer's corrective-discipline philosophy."

will obviously follow the contract. "The past practice of summary discharge referred to by the Company in its closing statement cannot modify the unambiguous contractual language requiring progressive discipline."[31] Even contract language stating, for example, that "an employee shall be liable to disciplinary action, including layoff or termination," and that employees may be discharged for repeated violations of plant rules, has been relied upon by arbitrators as evidence that the parties themselves intended progressive discipline to be applied.[32] The just cause provision, too, has been held in itself to incorporate some form of progressive discipline.[33]

On the other hand, lack of any reference in the contract to progressive discipline has been the basis upon which a few arbitrators have refused to set aside discharge.

> *Arbitrator Whyte:* While concepts of corrective (in contrast to punitive) discipline have merit, it is an arbitrator's function to interpret collective bargaining agreements, not advise company and union what should be in them. It is one thing to determine whether or not a contract permits discharging an employee under given circumstances. It is entirely another matter for an arbitrator to conclude that an employee's discharge violated a contract because of something not in the contract. The latter approach has the effect of rewriting the contract for the parties or, if not that, of adding something to the contract.[34]

Contract language has also controlled the manner in which progressive discipline is to be administered. The contract may, for example, spell out specific steps for progressive discipline, with which arbitrators are reluctant to tamper. Thus, where the contract required only that the company give at least one written warning to an employee prior to discharge or suspension, the

[31]*White Mfg. Co.*, 74 LA 1005 (LeBaron, 1980) (check-cashing operation on company property), quoting in support R. W. FLEMING, THE LABOR ARBITRATION PROCESS (1965): "Most arbitrators conclude that failure to comply with a contractual procedure will affect the degree of penalty which is appropriate, but not necessarily vitiate the action in its entirety."

[32]*Stuck Mould Works, Inc.*, 70 LA 1103, 1110 (Dyke, 1978) (low productivity).

[33]See cases cited in F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 672 (4th ed. 1985).

[34]*Aro, Inc.*, 47 LA 1065 (1966). See also *Tex-A-Panel Mfg. Co.*, 62 LA 272 (Ray, 1973) (no requirement in contract that progressive discipline be applied for unsatisfactory work performance; discharge upheld); *Union Carbide Corp.*, 46 LA 195 (Cahn, 1966) (arbitrator will not require progressive discipline not mandated by contract). In *Union Carbide*, as in many other cases, the question was whether suspension, rather than warnings only, was required prior to discharge.

arbitrator rejected the union's contention that a verbal warning would have been more appropriate for a first safety rule violation. Considering the seriousness of the matter, "the written warning to Grievant was not excessive nor an abuse of discretion."[35]

Another case in point is that of a school district that sent a letter to a teacher stating that failure to follow the district's rules of conduct "will result in discipline up to and including discharge." Progressive discipline under the contract consisted of four steps—oral reprimand, written reprimand, suspension, and discharge. Since no oral reprimand had preceded the letter, the arbitrator reasoned that the letter was not part of progressive discipline. Indeed, he regarded it as an improper attempt to bargain individually with the teacher as to the matters in question.[36]

Contract Language and the Test of Reasonableness. While the letter of the contract has customarily been followed by arbitrators, contract language dealing with discharge and progressive discipline has also been subjected to tests of reasonableness, in part because the just cause provision itself puts forward competing claims.

> **EXAMPLE NO. 1:** A wrapper in a supermarket's meat department with seven years' seniority was given a warning when she put the wrong price on a package of meat. When she did this again a short time later, she was discharged. The contract stated that no employee might be discharged without just cause and required at least one warning notice prior to suspension, discharge, or other disciplinary action.

The literal requirement of the contract might have been followed, the arbitrator found, but "[t]he Company misreads Article 5 of the collective bargaining agreement when it argues that it has free rein to discharge any employee committing his second offense. Just cause is required." In the wrapper's case the punishment just did not fit the crime. She was a long-service

[35] *Grain Processing Corp.*, 82-1 ARB ¶8229 (Thornell, 1982). See also *American Petrofina Co.*, 61 LA 861 (Marlatt, 1973) (absenteeism) (company may not bypass step in contract's progressive discipline system).

[36] *Rockford School Dist.*, 88-2 ARB ¶8367 (Traynor, 1987) (improper behavior by teacher toward student). See also *Simplex Prods. Div.*, 91 LA 356 (Byars, 1988) (failure to send warning letters under progressive-discipline policy showed company did not intend to apply notification rule).

employee, only small amounts of money were involved, and no customer complaints resulted from her errors. While the contract required that an employee be given at least one warning notice, just cause required that this grievant be given more than that: another warning or, at most, a suspension.[37]

> **EXAMPLE NO. 2:** Shortly after he complained that other employees had been performing duties belonging to his classification, an employee refused to carry out his foreman's work order and was discharged for insubordination. The union claimed the discharge was improper because under the contract that penalty was specified for four offenses that amounted to violations of the contract within an 18-month period; the employee's act of insubordination was only his third violation. The penalty schedule, the union argued, applied to all offenses, "regardless of their character or degree of malignity."

The union had a point, the arbitrator noted, when it said that all acts of misconduct at variance with the employment relationship can in some sense be construed as contract violations. Nevertheless, the union's interpretation of the contract was too narrow, since it could mean that an employee would have to commit (for example) four acts of physical violence before the employer could expel him from the plant. Furthermore, to uphold the union's interpretation would "substantially dilute" not only the management rights clause but also management's contractual right to discharge employees "for just and proper cause." The employee's misconduct amounted to an act of flagrant insubordination for which discharge was appropriate.[38]

[37] *Shop Rite Foods, Inc.*, 67 LA 159, 162 (Weiss, 1976). In *Tokheim Corp.*, 62 LA 1040, 1042 (Edes, 1974), the arbitrator found that giving the grievant a written warning for a first offense of unexcused absence under the progressive discipline system was unreasonable even though dangerous road conditions were not an accepted excuse for absence:

> The whole purpose of corrective discipline . . . is that the employee will heed the lesser discipline and take the action necessary to avoid the harsher consequences. But it makes no sense and does violence to basic concepts of equity to mete out discipline in regard to conduct which the employee cannot correct or take any action whatsoever to avoid.

See also *Warren Assemblies, Inc.*, 92 LA 521 (Roumell, 1989) (leaving post without permission): "Corrective discipline is not to be applied in lock step. Each situation must be considered and the rule of reasonableness applied."

[38] *Alliance Mach. Co.*, 48 LA 457 (Dworkin, 1967). Other cases in which arbitrators have held that one or more steps in a system of progressive discipline may be bypassed if the misconduct is very serious include *City of Appleton*, 62 LA 342 (Lee, 1974) (abuse of sick leave); *Active Indus., Inc.*, 62 LA 958 (Ellmann, 1974) (absenteeism, malingering); *United Parcel Serv., Inc.*, 67 LA 861 (Lubow, 1976) (assault on supervisor); *Viking Fire*

Contract provisions that allow the company to discharge employees summarily for certain enumerated offenses, but require progressive discipline for others, have been relied upon by arbitrators in many cases as a guide to the parties' intentions.[39] But such provisions, too, have been found to have been unreasonably applied where the employer tried to elevate some act of misconduct into the "summary" category when it really did not belong there. A hotel bellman's profane outburst, for example, was found to have resulted from momentary and extreme frustration when his supervisor refused to help him find a personal possession he urgently needed; it could not reasonably be construed as "willful misconduct," which was cause for summary discharge under the contract.[40] In another case, the arbitrator rejected the employer's argument that hiding in a storage closet was comparable to sleeping on the job, which called for summary discharge. Hiding, he reasoned, was more akin to "willful idleness," an offense which the contract made subject to progressive discipline."[41]

Established Policy and/or Past Practice. Some situations can be judged in terms of the parties' own actions regarding discipline—that is, whether the employer has followed its own schedule of penalties or past practice. For example, even though the grievant had reached the point where the employer's progressive-discipline schedule provided for discharge, the arbitrator set aside his discharge because other employees had been treated more leniently for offenses no less serious than those of the grievant. The arbitrator viewed the grievant's rule violation—sleeping on the job—as a minor transgression under the circumstances. But even if the employer's schedule were accepted at face value, he said, the employee should not have been discharged because the schedule had not been applied consistently.[42] Thus, "once guidelines are established and publicized, only under 'extraordinary circumstances' may an employer disregard his own guidelines. Otherwise, the guidelines would be meaningless."[43]

Uniformity Versus Individuality. Ordinarily one would think that it is impossible to treat all employees in the same way and at the same time treat them differently—to enforce a progressive discipline system uniformly, yet at the same time recognize each individual as unique, so that the length and quality of his or her service and other relevant considerations play a part in determining the appropriate penalty.

Arbitrators manage to reconcile these two seemingly contradictory propositions by reasoning along these lines: "Management must be permitted to exercise its judgment as to the proper discipline to impose as long as it does not discriminate against a particular employee. If progressive or corrective discipline is used, then this method must be applied in all cases."[44] For

Protection Co., 74 LA 947 (Pollard, 1980) (insubordination, violation of safety procedures); *R. E. Phelon Co.*, 75 LA 1051 (Irvings, 1980) (leaving work area without authorization); *Interstate Brands-Four S*, 76 LA 415 (Adler, 1981) (leaving early).

[39] *E.g., J. Weingarten, Inc.*, 77-1 ARB ¶8050 (Helburn, 1977), where the grievant's discharge for using obscene language to a customer was not sustained in part because that offense was not included in the list of offenses made subject to summary discharge. In *Airco, Inc.*, 62 LA 1103 (Traynor, 1974), the arbitrator set aside the grievant's summary discharge for insubordination and intimidating his supervisor because those offenses were not included in the contract's "summary discharge list." To uphold discharge, he said, would amount to impermissible amending of the contract; only in an extreme case would the arbitrator be justified in upholding discharge for a nonlisted offense. For other cases advocating strict adherence to the contract, see, e.g., *Morton Frozen Foods*, 61 LA 98 (Barnhart, 1973) (insubordination); *Von's Grocery Co.*, 1975 ARB ¶8186 (Christopher, 1975) (failure to record sale); *Browning-Ferris Indus. of Ohio, Inc.*, 77 LA 289 (Shanker, 1981) (drinking on duty).

[40] *MGM Grand Hotel*, 76-1 ARB ¶8197 (Koven, 1976).

[41] *Western Auto Supply Co.*, 71 LA 710 (Ross, 1978). See also *Precision Extrusions, Inc.*, 61 LA 572 (Epstein, 1973) (violation of safety rule not a "wanton or malicious" violation of major shop rule); *Manistee Drop Forging Corp.*, 62 LA 1164 (Brooks, 1974) (intentional violation of safety rules not punishable as insubordination); *Solano Contract Warehouse Corp.*, 80-1 ARB ¶8065 (Koven, 1979) (failing to follow common sense safety precautions not recklessness or willful negligence); *Hoover Co.*, 82-2 ARB ¶8524 (Dean, 1982) (improper language and sexual suggestions to female employee not actual sexual activity or demand). But in *Anchor Supply Co.*, 69 LA 655 (Witt, 1977), the arbitrator found that deliberate falsification of a time card, which was not on the list of summary-discharge offenses in the contract, was tantamount to theft, which *was* on that list; discharge was upheld. Other cases where the grievant was found to have committed less serious misconduct than that alleged by the company are discussed from the standpoint of proof in Ch. 5, p. 243.

[42] *Essex Industrial Chems.*, 88 LA 991 (Cluster, 1987). See also *Pyrene Mfg. Co.*, 9 LA 787, 788 (Stein, 1948) ("The Company must either use its warning system or abandon it. . . . Where a warnings system is in effect, the workers have a right to be warned . . . ."); *F. W. Stock & Sons*, 78-1 ARB ¶8158 (Beitner, 1978) (discharge reduced to suspension because company had applied progressive disciplinary system to others for similar offenses); *Ryan Aeronautical Co.*, 39 LA 58 (Spaulding, 1962) (altercation with foreman); *R. Herschel Mfg. Co.*, 47 LA 20 (Sembower, 1966) (absenteeism); *Southwest Elec. Co.*, 54 LA 195 (Bothwell, 1969) (carrying unauthorized passengers); *O'Brien Corp.*, 77-2 ARB ¶8405 (Wright, 1977) (inefficiency, incompetence); *Wolf Mach. Co.*, 72 LA 510 (High, 1979) (various infractions); *Zapata Indus., Inc.*, 76 LA 467 (Woolf, 1981) (insubordination); *Metal Container Corp.*, 81-2 ARB ¶8609 (Ross, 1981) (tardiness).

[43] *Metal Container Corp.*, *supra* note 42, at 5652.

[44] *Sperry Rand Corp.*, 70-1 ARB ¶8149, 3521 (Kesselman, 1969) (absenteeism). Arbitrator Kerrison stated the same principle in *Electric Hose and Rubber Co.*, 47 LA 1104 (1967) (unauthorized absences): "While this does not mean that all must be judged by

example, if long service is considered as a mitigating circumstance in the case of one employee, it should be a mitigating circumstance for all.

> *Arbitrator Seward:* Included in the concept of "just cause" is the principle that the Company's right to discipline or discharge must be exercised justly and consistently; that the distinctions which it draws between employees in the imposition of penalties must be reasonable and fair. The Umpire has previously held—and he here repeats—that the Company need not penalize *all* employees who are guilty of an offense if it is to penalize *any* of them. But he also holds that if the Company is to select some employees for discipline and let others off scot-free (or if it is to impose heavy penalties on some and lighter penalties on others) it must—if it is to meet the standard of "just cause"—show that its reasons for making such distinctions were sound and just.[45]

Mitigation and Its Opposite, Aggravation. The factor that plays the leading role in balancing the need for uniformity against the need to treat employees as individuals is the length and quality of an employee's work record. A Niagara of cases stands for the proposition that an employer may justifiably impose a lesser penalty on an employee with long, creditable service than on an employee whose service is short or whose work record is poor.[46]

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the same standards as interpreted by giving the same penalties for the same offense at all times, regardless of extenuating circumstances, it does mean that all must be judged by the same standards as such, and that rules must apply equally to all." See also *Interchemical Corp.*, 48 LA 124 (Yagoda, 1967) (refusal to perform work); *Gerstenlager Co.*, 66-1 ARB ¶8331 (Teple, 1966) (tardiness); *Group W Cable of Chicago*, 87-2 ARB ¶8447 (McAlpin, 1987) (sleeping on job); and cases cited in Ch. 6, pp. 325–27.

[45] *Bethlehem Steel Co.*, 29 LA 635, 643 (1957) (discharge of union officers for illegal work stoppage). The question of selective discipline and penalty is an ever-present issue in cases involving strikes, picketing, illegal walkouts, slowdowns, etc. See the following cases for treatment of this problem: *Stockham Pipe Fittings Co.*, 4 LA 744 (McCoy, 1946); *McInerney Spring & Wire Co.*, 21 LA 729 (Howlett, 1953); *McLouth Steel Corp.*, 24 LA 761 (Bowles, 1955); *American Radiator & Standard Sanitary Corp.*, 37 LA 593 (McCoy, 1961); *Ford Motor Co.*, 64-1 ARB ¶8128 (Platt, 1963); *Phillips Indus.*, 66-1 ARB ¶8042 (Stouffer, 1965); *Trane Co.*, 71-1 ARB ¶8089 (Turkus, 1971); *Aladdin Indus., Inc.*, 61 LA 896 (Hilpert, 1973); *Abex Corp.*, 68 LA 805 (Richman, 1977); *Cecil I. Walker Mach. Co.*, 78-1 ARB ¶8004 (Hunter, 1977); *Clinton Corn Processing Co.*, 71 LA 555 (Madden, 1978), with many additional citations; *Electrocast Steel Foundry, Inc.*, 78-2 ARB ¶8492 (Larkin, 1978); *Celotex Corp.*, 79-2 ARB ¶8506 (Murphy, 1979).

[46] Recent decisions in point include *Air Treads, Inc.*, 86 LA 545 (Allen, 1986) ("blatant insubordination"); *Deer Lake School Dist.*, 94 LA 334 (Hewitt) (pilferage); and cases cited in notes 47 and 48 *infra*. But see *W. R. Grace Co.*, 86 LA 999 (Galambos, 1986) (tampering with company records), holding that an arbitrator may not reduce a penalty because of the grievant's long and satisfactory service "in the absence of any provisions in the Agreement regarding degrees of discipline." For citations to many other cases weighing the effect of past record on penalty, see F. ELKOURI & E. A. ELKOURI, *supra* note 33, at 679–81.

Not only is an employee with long service presumed to be capable of satisfactory performance if given the opportunity; because such an employee has a greater stake in his job, he is entitled to greater consideration than someone who has been around only a short time and has less to lose.[47] Indeed, the administration of a disciplinary system without making allowances for long service has often led to the overturning of discharge decisions.[48]

Other factors that may warrant giving an employee a lesser penalty than would otherwise be justified include provocation;[49] contribution by management to the misconduct;[50] absence of

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[47] *I. Schumann & Co.*, 65 LA 674 (Cohen, 1975) (refusal to work overtime); *Pacific Tel. & Tel. Co.*, 73 LA 1185 (Gerber, 1979) (intoxication, other violations). But see *Industrial Phosphating Co.*, 87 LA 877 (Daniel, 1988) (abusive language): "Simply because the grievant is a short term employee does not mean that he loses equal standing with other employees to require that the employer treat him fairly and justly in terms of discipline."

[48] *Olin Corp.*, 86 LA 1096, 1098, 86-1 ARB ¶8248 (Seidman, 1986) (sleeping on job):

> [B]efore invoking terminal discipline the Company must consider the employee's entire past record with respect to work performance, attendance, and discipline and give it appropriate weight in determining whether discharge, or some lesser discipline, should be meted out . . . . The company's failure to do so, and its affirmative policy not to do so, have fatally flawed its decision and made it unjust because procedurally infirm.

In *Armstrong Cork Co.*, 71-1 ARB ¶8242, 3811 (Wolf, 1971), where the employer followed its progressive discipline system to the letter, giving the grievant repeated warnings and progressively more severe penalties for his absenteeism, the arbitrator noted: "Its actions were impeccable except in one respect. . . . The punishment was applied mechanically without sufficient regard for the circumstances surrounding the event and the individual." What were those circumstances? Most conspicuously, the grievant had been employed for 14-1/2 years and had a good record. See also *Shepard Niles Crane & Hoist Corp.*, 71 LA 828, 831 (Alutto, 1978) (absenteeism and tardiness):

> [A]n employee found asleep on the job, but possessing an unblemished 20-year work history should certainly be treated differently than an employee with four years seniority and a history of disciplinary problems. It is circumstances such as these that appear to explain discrepancies in the severity of disciplinary action taken against the grievant and other employees.

[49] *E.g., Reynolds Metals Co.*, 55 LA 1168 (Block, 1971) (grievant "erred greatly" in refusing supervisor's order to leave office, but supervisor's "offensive tongue lashing," which included use of racial epithets, was "highly provocative factor"); *Industrial Phosphating Co., supra* note 47 (grievant's resort to abusive language not excusable, but fact that grievant had been victim of several payroll errors was "degree of provocation"); *Kimberly-Clark Corp.*, 87-2 ARB ¶8315 (Ratner, 1987) (insubordination); *Warren Assemblies, Inc.*, 92 LA 521 (Roumell, 1989) (supervisor's having discharged grievant without reasonable cause viewed as provocation for profane outburst).

[50] *Golden Operations, CWC Castings Div. of Textron, Inc.*, 80-2 ARB ¶8543, 5433 (Ipavec, 1980), in which management, upon discovering that employees had been concealing beer on the premises, kept watch on the hiding place and waited until an employee retrieved and drank some beer before acting. "When a Company has knowledge or could reasonably foresee that a violation of the Company's rules is about to

intent to commit serious misconduct;[51] absence of hazards or other aggravating circumstances;[52] language difficulties;[53] and acute personal problems such as chronic alcoholism and mental illness.[54] With particular reference to alcoholism and drug abuse, however, several arbitrators have held that rehabilitative efforts undertaken by an employee following discharge do not constitute a mitigating circumstance.[55] Likewise, financial difficulties experienced by a discharged grievant and his family have been viewed as irrelevant.[56]

By contrast, factors that support a relatively severe penalty within the framework of the company's penalty system might include misconduct that was highly dangerous;[57] additional misconduct that compounded the original offense (for example, profanity caused by intoxication);[58] malicious intent;[59] and lack of truthfulness or failure to cooperate with the employer's investigation.[60]

occur, the Company should remove the means by which the rule is to be broken." See also *Zinsco Elec. Prods., Inc.*, 65 LA 487 (Erbs, 1975) (employer failed to take steps to prevent fight it knew was impending); *AFG Indus.*, 87 LA 1160 (Clarke, 1986) (employer at fault in failing to provide proper supervision at company picnic where it furnished beer); *Greenlee Tool Textron Co.*, 88-1 ARB ¶8102 (Fischbach, 1987) (employer's failure to provide remedial instruction contributed to grievant's second instance of negligence); *Mead Corp.*, 89-2 ARB ¶8367 (Haemmel, 1989) (penalty for negligence reduced because supervisor guilty of gross negligence in failing to train properly).

[51]*Basic Vegetable Prods., Inc.*, 70-1 ARB ¶8020, 3083 (Koven, 1969) (falsification of time card): "[D]espite the very serious character of the grievant's misconduct, that conduct did not include the elements of a deliberate and premeditated theft."

[52]*Hooker Chem. Co.*, 74 LA 1032, 1034 (Grant, 1980) (smoking marijuana on job): "Although the Company states its concern about the possibility of dangerous mistakes caused by the erroneous mixture of chemicals, the Grievant did not work in a sensitive area; his job was in the boiler house unloading and shoveling coal."

[53]*Graphic Communications Union*, 89-1 ARB ¶8018 (Koven, 1988) (insubordination) (some doubt whether grievant fully understood direct order because of difficulty with English).

[54]*Phillips 66 Co.*, 88 LA 617 (Weisbrod, 1987) (habitual gambling and probable presence of mental illness viewed as mitigating circumstances); *New Jersey Bell Tel. Co.*, 89-2 ARB ¶8381 (Nicolau, 1988) (alcoholism a diagnosable and treatable disease; presence of such a disease and possibility of recovery can be considered mitigating circumstances). For a review of this general category of mitigating circumstances, see M. L. Greenbaum, *The "Disciplinatrator," the "Arbichiatrist," and the "Social Psychotractor"—An Inquiry Into How Arbitrators Deal With a Grievant's Personal Problems and the Extent to Which They Affect the Award*, 37:4 ARB. J. 51–64 (1982).

[55]*Pittsburg & Midway Coal Mining Co.*, 91 LA 431, 434 (Cohen, 1988): "If Grievant's actions after this discharge could be used to reverse the Company's decision, the Company would be placed in an impossible position, *i.e.*, whenever employees are discharged for intoxication, they need only seek some sort of rehabilitation programs to be able to then proclaim that they are changed persons and should be reinstated." See also *Lick Fish & Poultry*, 87 LA 1062 (Concepcion, 1986); *Baltimore Tin Plate*, 89-1 ARB ¶8308 (Aronin, 1988); and cases cited in Ch. 5, note 72, where several contrary rulings may also be found.

[56]*Georgia Kraft Co.*, 84-1 ARB ¶8127 (Yancy, 1984) (falsification of records); *Thomas Steel Strip Co.*, 87 LA 994 (Feldman, 1986) (testing positive for drugs).

[57]As in *Decar Plastics Corp.*, 44 LA 921, 923 (Greenwald, 1965), in which placing lighted cigarettes in someone's pocket was considered far more serious than other types of horseplay for which lesser penalties had been imposed. "All horseplay, ranging from joking involving a more remote possibility of injury to that involving a high risk of serious injury, need not be uniformly regarded as requiring the same penalty, regardless of the facts of the particular situation."

In some instances both mitigation and aggravation are present, and a balancing act is called for. "Just cause is essentially a standard of reasonableness and fairness. It requires that the penalty imposed must fit the seriousness of the offense and must take into consideration the total circumstances, both those in aggravation and those in mitigation."[61]

Finally, there is an area within which management may exercise discretion. As Harry Shulman put it: "[The arbitrator's] power is only to modify penalties which are beyond the range of reasonableness, and are unduly severe. If the penalty is within that range, it may not be modified."[62]

Industrial Due Process. One of the factors to which arbitrators may pay heed is industrial due process. Aside from the preliminary and basic requirement that a progressive discipline system must consist of

> the successive application cumulatively for employee infractions beginning with oral reprimands, written reprimands, suspensions, and finally discharge where really compelled . . . progressive discipline requires still more, namely, industrial due process to the end that the employee also may be more fully informed as to the charge and have an opportunity for a hearing for himself

[58]*White Pine Copper Co.*, 63-2 ARB ¶8548 (Larkin, 1963).

[59]*E.g., Calmar, Inc.*, 51 LA 766 (Turkus, 1968), in which an employee's insubordinate act was deliberately designed to humiliate and embarrass a supervisor in front of other employees.

[60]*Arden Farms Co.*, 45 LA 1124 (Tsukiyama, 1965). See also cases cited in Ch. 3, notes 102–08.

[61]*Fulton Seafood Indus., Inc.*, 74 LA 620, 622 (Volz, 1980). Other cases balancing mitigating and aggravating factors include *Louisville Cooperage Co.*, 70-2 ARB ¶8652 (Volz, 1970) (draining untaxed whiskey out of barrels; discharge set aside); *F. E. Olds & Son*, 64 LA 726 (Jones, 1975) (setting fire to dramatize safety problems; discharge sustained).

[62]*Ford Motor Co.*, Opinion A-2, June 17, 1943. See also *Jackson County Medical Care Facility*, 65 LA 389 (Roumell, 1975) (unbecoming conduct); *Arrow Lock Corp.*, 84 LA 734, 735 (Nemaizer, 1985) ("I do not conceive it to be my role as Arbitrator to grant clemency where the disciplinary penalty assessed was not excessive"); *Ohio State Highway Patrol*, 94 LA 58 (Bittel, 1990) (only if employer's decision "lacks rationality and fairness" can arbitrator reduce penalty).

as to his alleged offense. Counsel or union representation is essential, too.[63]

Notice. In addition to the requirement that progressive discipline must function within the framework of industrial due process, progressive discipline must also operate within the framework of notice.

> **EXAMPLE:** A foreman, suspecting that an employee's poor production might be due to her long fingernails, ordered her to cut them. The employee refused, and was suspended first for three days, then for 10 days. Returning from the second suspension, the employee displayed her freshly clipped nails to the foreman and declared that she was ready to go back to work. Deciding her nails were still too long, the foreman fired the employee.

Progessive discipline, yes—but the discharge was set aside on notice grounds.

> [A]ccording to the believable evidence . . . the orders given the grievant *at no time* specified the length to which the grievant's nails should be cut, in order to satisfy her employer's rquirements. That failure to articulate may have been permissible for suspensions, but it was impermissible for discharge. It is one thing to be insubordinate; it is quite another to seek how not to be, and to be rebuffed.[64]

Where Progressive Discipline Does Not Apply

Certain types of misconduct often are considered not to be subject to the requirements of progressive discipline, either because the misconduct is so serious that the employment relationship cannot survive it or because corrective measures could not be expected to have much effect. Some of the more common exclusions are the following:

"Malum in se." In addition to the standard *malum in se* offenses that call for summary discharge, such as theft[65] ("even though

[63]*Giant Eagle Markets, Inc.*, 1975 ARB ¶8145, 3608 (Emerson, 1975) (drinking).
[64]*Honeywell, Inc.*, 80-1 ARB ¶8270 (Belshaw, 1980).
[65]*American Motors Corp.*, 52 LA 709 (Keefe, 1969). The view that progressive discipline is inapplicable to violations involving money was stated in *Niagara Frontier Transit Sys.*, 24 LA 783 (Thompson, 1955) (falsification of time cards): "It seems more appropriate to apply the idea of 'progressive' discipline to loafing, negligence, incompetence, even damage to machines and equipment, etc., than to infractions which more or less deprive the Company of money directly."

the amount of money involved is very small"[66]), arbitrators have recognized the propriety of summary discharge for other serious offenses, among them striking a foreman,[67] gross insubordination,[68] destruction of company property,[69] lending money to a fellow employee at usurious rates,[70] and fighting.[71] The existence of a progressive discipline system does not mean that management has given up the right to discharge summarily for serious offenses.[72] It has also been held that a past failure to discharge for a given offense of this nature cannot "be considered a waiver of the right to discharge."[73]

Alcohol and drug use. In some industries, such as transportation, drinking or drug use on the job is considered to be so serious an offense that it is beyond the reach of corrective discipline. "Where the safety of the public is at issue, arbitrators are exceptionally hesitant about upsetting a decision of management."[74]

[66]*United Hosiery Mills Corp.*, 22 LA 573, 576 (Marshall, 1954). Other cases sustaining discharge for dishonesty involving trivial sums include *Tri-City Nursing Center*, 84-1 ARB ¶8289 (Keefe, 1984) (one onion); *Greyhound Food Management*, 89 LA 1138 (Grinstead, 1987) (58-cent can of orange juice); *Timken Co.*, 88-1 ARB ¶8056 (Duda, 1987) (claim of 8.0 hours worked rather than 7.9 hours). However, in *Defense Gen'l Supply Center*, 89-2 ARB ¶8473 (Veglahn, 1989), discharge for attempted theft of three rolls of Scotch tape was reduced to a two-month suspension because there was no established practice of discharging for theft. The arbitrator said that attempted theft was tantamount to theft, but under company rules discipline was stated to be corrective in nature.
[67]*E.g.*, *White Front Stores, Inc.*, 61 LA 536 (Killion, 1973); *Continental Fibre Drum Co.*, 83 LA 1197 (Yaney, 1984).
[68]See *Link-Belt Co.*, 17 LA 224 (Updegraff, 1951) (leaving work without permission); *International Tel. & Tel. Corp.*, 54 LA 1110 (King, 1970) (insubordination; making speech in company cafeteria during lunch); *Fourco Glass Co.*, 84 LA 693 (Cantor, 1985) (defiance of order to return to work); *Rockwell Int'l Corp.*, 88 LA 418 (Scholtz, 1986) ("blatant" insubordination consisting of directing obscenities at two managers and refusal to surrender badge to supervisor or guards).
[69]*R. E. Phelon Co.*, 75 LA 1051 (Irvings, 1980) (unauthorized absence); *Southern Bell Tel. & Tel. Co.*, 25 LA 270 (McCoy, 1955) (strike misconduct).
[70]*Glenn L. Martin Co.*, 27 LA 768 (Jaffee, 1956).
[71]*Harry M. Stevens, Inc.*, 51 LA 258, 260 (Turkus, 1968): "On job physical fighting standing alone is just cause for dismissal. It need not be buttressed by prior misconduct or offensive behavior." Many other cases also stand for this proposition; see F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 694 (4th ed. 1985). But mitigating circumstances have often been cited as ground for setting aside the discharge penalty; see, e.g., *Teledyne Monarch Rubber*, 89-1 ARB ¶8295 (Prusa, 1989), where the discharge of the aggressor in a fight that caused incapacitation of the victim for 27 days was reduced to a disciplinary suspension. The grievant's clean 16-year work record and the fact that the attack was an unpremeditated outgrowth of a verbal altercation were cited as mitigating factors.
[72]*Inland Steel Prods. Co.*, 47 LA 966 (Gilden, 1966).
[73]*Gries Reproducer Corp.*, 47 LA 747 (Cahn, 1966).
[74]*Deluxe Saw and Tool Co.*, 70-2 ARB ¶8639 (Hon, 1970) (on-the-job drinking by truck drivers).

More generally, Arbitrator Koven has identified five factors which, singly or in combination, will be held to justify discharge for drinking or intoxication on the job without resort to progressive discipline (or further steps in progressive discipline):

> (1) where the grievant has previously been disciplined for alcohol-related misconduct or been warned that further incidents of drinking or intoxication may lead to discharge; (2) where the grievant has compounded his alcohol-related offense with some additional act of misconduct such as insubordination, profanity, fighting or the like, or where his drinking is tied to excessive absenteeism; (3) where the grievant is a chronic alcoholic who has refused treatment or who has lapsed in his rehabilitation efforts; (4) where the grievant's seniority is very short and/or his disciplinary record is poor overall; (5) where the grievant's job has special hazards, so that intoxication on the job poses particular dangers to persons and property.[75]

The use of illegal drugs in the workplace is similar to drinking on the job in that the result may be impairment and consequent danger to persons and property. But there is an additional factor which is critical in the eyes of many arbitrators—drug use is a criminal activity, whereas alcohol use is not. Making this point, Arbitrator Harry Dworkin has ruled that suspension is not an effective way to deal with employees guilty of selling, using, or providing drugs to fellow employees. His reasoning is as follows:

> A suspension is simply not an adequate corrective action in this situation. Given the potential profit involved in providing drugs, the risk of suspension provides little deterrent to one who might engage in this activity. This is particularly true given the known difficulty of actually proving such involvement. The only effective, and appropriate corrective action is to separate the provider from his "market."[76]

[75]*Armstrong Rubber Co.*, 77 LA 775, 778 (1981) (footnotes omitted), cited with approval in *Maintenance Central for Seniors*, 86 LA 288 (Roumell, 1985) (drinking during break).

[76]*Burger Iron Co.*, 92 LA 1101, 1106 (1989). Dworkin also gave this response to a union argument that enlightened employers frequently deal with alcoholism and drug addiction as an illness rather than as a disciplinary problem: "[S]uch commendable endeavors do not serve to deprive management of its contractual rights to discipline for just cause, nor do they grant the Arbitrator authority to modify contractual language, or to add new language that the parties had not deemed appropriate to incorporate in their agreement." See also *San Francisco Police Dep't*, 87 LA 791 (Riker, 1986) (progressive discipline not required in case of cocaine use by police dispatcher, since such use is incompatible with functions as dispatcher).

Sickness. In some contracts, chronic absenteeism due to illness is not subject to progressive discipline.[77] Inherent in misconduct that is responsive to progressive discipline is that the employee can voluntarily improve his conduct; to put it another way, it is misconduct the employee can do something about. Obviously, this is not the case with sickness, which by its very nature is involuntary. Therefore, it is often said, "[p]unishment for illness is not logical procedure."[78]

> *Arbitrator J. Dworkin:* Sickness is not just cause for discipline. But at the same time, no company is required to retain a person in the workforce whose illness disables him or her from working. Such individual is not a candidate for discipline *in the classic sense.* However, it is well understood that one who will not or cannot report to work regularly, even through no fault of his own, may be discharged for non-disciplinary reasons. In such instance, the Company is required to consider factors that are not necessarily appropriate to normal disciplinary cases. A person who is ill is not subject to termination of employment unless recovery from the illness and resumption of duties is not something that is likely to occur in the foreseeable future.[79]

Incompetence. Poor workmanship and negligence are obvious candidates for progressive discipline when the cause is inattention or attitude.[80] But if poor work performance results from genuine incompetence (because the employee lacks either native ability or proper training), progressive discipline cannot reasonably be expected to have any corrective effect.[81] Some other response may be called for—demotion, transfer, training, or

[77]*Logan Metal Stampings, Inc.*, 53 LA 185 (Kates, 1969).

[78]*Atlantic Richfield Co.*, 69 LA 484, 491 (Sisk, 1977), with additional citations. In *Mead Paper*, 91 LA 52 (Curry, 1988), progressive discipline requirements were held not to apply to an employee whose absences because of accidents and illness constituted almost a quarter of his 18 years of employment, where the discharge was based on unsuitability for work in the mill and not on chronic absenteeism, and the termination letter stated that the action was nondisciplinary.

[79]*Airco, Inc.*, 84-1 ARB ¶8121, 3557 (1984).

[80]See, e.g., *Home Bldg. Corp.*, 74-2 ARB ¶8652 (Goetz, 1974) (incompetence, inefficiency); *Photo Color, Inc.*, 76-1 ARB ¶8178 (Cohen, 1976) (incompetence and inefficiency); *Eagle Picher Indus., Inc.*, 77-1 ARB ¶8099 (Ipavec, 1977) (negligence, carelessness, defective work); *J. P. Miller Artesian Well Co.*, 78-1 ARB ¶8001 (Doppelt, 1977) (negligence); *Stuck Mold Works, Inc.*, 78-1 ARB ¶8255 (Dyke, 1978) (improper job attitude, neglect of duty).

[81]Such a case was *Kerr-McGee Refining Corp.*, 88-2 ARB ¶8330 (Allen, 1988), where the grievant's test score was less than half that of the next lowest scorer and where the grievant, even after retraining, could not meet the requirements of the job.

even termination if no other work is available, depending on the employee's past record, length of service, and what the contract permits.[82]

Safety. Some kinds of behavior in some industries simply cannot be tolerated or dealt with by means of progressive discipline. A prime example of this principle concerns safety. As Arbitrator Seward put it:

> In dealing with the general run of offenses, the proper function of discipline is to correct the employee's conduct; discharge is justified only where an employee's prior disciplinary record indicates that he is incorrigible. It is universally recognized, however, that there are some offenses which are of so serious a nature that the employer cannot properly be required to run the risk of their repetition. . . . Unimportant as [the grievant's] failure to stop may seem after the event, the fact is that he risked the lives of the passengers who were entrusted to his care. If a train had come while his bus was on the tracks, all of his prior good record as a driver would not have saved a life.[83]

II. Penalty: In Practice

Up to this point the focus has been on the conceptual foundation for penalty systems and the standards on which arbitrators rely in deciding whether progressive discipline should have been applied and, if so, was applied properly. The focus of this section is upon some immediate and everyday practical questions involved in evaluating penalty.

[82] *General Tel. of Cal.*, 44 LA 669 (Prasow, 1965). The arbitrator in this case also suggested that where an act of negligence, or a lapse in performance, results not from willful misconduct but from "errors in judgment, where the good faith of the employee is not in question," the appropriate response is not punitive action like suspension, but a warning that will improve the employee's understanding of what is expected.

[83] *Pennsylvania Greyhound Lines, Inc.*, 19 LA 210, 212 (Seward, 1952). In *J. R. Simplot Co.*, 77-1 ARB ¶8272 (Conant, 1977), the arbitrator found that penalties associated with safety rules are intended to protect employees and are not for punitive purposes. Hence, an arbitrator "should not so strictly consider all the due process questions concerning rules and their strict application as one would review these questions in a discipline case." The logical extension of that position is that safety rule violations ought not to be subject to progressive discipline.

Warnings and Suspensions In Progressive Discipline

Warnings as Notice Versus Warnings as Reprimands

> Arbitrator Dean: The purpose of a warning is to bring a halt to the offensive activity and to afford the offending individual an opportunity to reform. If, after sufficient warning, the individual does not improve to the degree desired, he may be deemed incorrigible and dismissed.[84]

The term "warning" is used in two different senses within the context of progressive discipline: as notice and as reprimand. In the sense of notice, a warning (whether oral or written) tells an employee what behavior is expected and what penalties may be imposed for particular acts of misconduct. In the sense of reprimand, a warning constitutes a formal record that an employee has committed a disciplinary offense. In that dual sense, warnings are the cornerstone of progressive discipline.

Because the accepted purpose of industrial discipline is corrective rather than punitive, the purpose of any disciplinary system obviously would be defeated if an employee could be discharged without having been given notice that correction is necessary. The critical role of notice in progressive discipline is most evident in cases where notice is entirely lacking. A good example is management's reaction to an employee who was spotted drinking beer in the locker room. Instead of calling him on the carpet immediately for his violation, his supervisors decided to keep watch on him, and after he was observed drinking several more times he was discharged. Because he had no warning prior to discharge that his job was in jeopardy, the employee had no opportunity to correct his conduct; in fact, the company's conduct had the opposite effect of allowing him to compound his misconduct. Under these circumstances, discharge was without just cause and the employee was reinstated with full back pay.[85]

As a necessary concommitant of this goal of rehabilitation,"[t]he concept of a warning implies an opportunity for correction. This in turn implies opportunity for sober reflection

[84] *Hoover Co.*, 82-2 ARB ¶8524, 5345 (1982) (writing lewd remarks about female coworker on men's room wall). The purpose of warnings is also discussed in *Northern Cal. Grocers Ass'n*, 53 LA 85 (Eaton, 1969) (violation of check-cashing rules).

[85] *Industrial Plastics Corp.*, 58 LA 546 (Willingham,, 1972).

and in many cases resolves itself into a question of how much time has elapsed between the warning and the final discharge."[86]

A warning in the sense of reprimand (whether it is called a reprimand, a warning notice, an incident report, or something else) has two closely related functions: From the employer's point of view, a reprimand becomes part of the employee's disciplinary record that management may ultimately use to justify a more severe penalty, including discharge. From the employee's point of view, a reprimand does more than tell him what conduct is acceptable or unacceptable; it places him on notice that he can no longer count on the advantages of a "clean" disciplinary record if he commits another act of misconduct, and that more severe disciplinary action is likely to follow.[87]

While every warning functions as a form of notice, a warning does not necessarily have a disciplinary component. A case in point is the employer that adopted a new rule reducing the time given employees to put away their tools and thereafter suspended several employees who violated the rule. The employer believed that the posting of the rule amounted to the verbal warning which the contract required as the first step in progressive discipline. The arbitrator pointed out, however, that management's action had neither of the characteristics of a disciplinary warning. That is, it was not entered on the record of any of the employees, and it was directed to all employees affected by the rule, irrespective of whether any individual had been guilty of an "abuse" of the rule.

> Such action being in the nature of the promulgation of a rule or in the nature of a general instruction to the employees cannot properly be considered as the type of warning for a 'first offense' which the contract contemplates.[88]

[86] *Standard Shade Roller Div.*, 73 LA 86, 90 (Dawson, undated) (refusal to work overtime), also citing *I. Schumann Co.*, 65 LA 674 (Cohen, 1975). For an extreme example of the lack of such opportunity, see *Rockford School Dist.*, 88-2 ARB ¶8367 (Traynor, 1987) (improper behavior toward student), where the grievant was given an oral and a written warning and then discharged, all on the same day, for three unexcused absences. Such a compression of the steps of progressive discipline, the arbitrator held, gave the grievant no chance to improve.

[87] *Armco Steel Corp.*, 52 LA 101 (Duff, 1969) (poor record).

[88] *Ingalls Shipbuilding Corp.*, 39 LA 419, 429 (Hebert, 1962). Similarly, in *San Mateo County Restaurant-Hotel Owners' Ass'n*, 59 LA 997 (Kenaston, 1972) (violation of work rules), the arbitrator found that a supervisor's oral direction that the grievant take the rules home and study them if she could not remember them did not constitute an oral warning in a disciplinary sense.

One arbitrator has made the point that, if a reprimand is to become a part of the employee's record and form the basis for discipline in the event of further misconduct, the employee should have an opportunity to correct the behavior in question and thus clear his or her record. At issue was a written reprimand issued to an employee for disrespectful and disruptive behavior during a training session. The arbitrator found the reprimand justified; but because the employee was not put on notice that his conduct was intolerable until it was too late for him to do anything about it, or told that he could be disciplined if it continued, the arbitrator directed that the reprimand be removed from the employee's record at the end of one year if he did not engage in misconduct during that period.[89]

The Need for Suspensions in Progressive Discipline

One View: Disciplinary Suspension Required Before Discharge. Three reasons are given for this majority position on suspension.

(1) *The notice factor.* As discussed in Chapter 1, a major reason why suspension is considered an indispensable step in progressive discipline is the notion that loss of earnings is a more effective form of notice than a simple warning. In Arbitrator Marshall's words, "[o]ne of the purposes of disciplinary suspensions is to demonstrate that an employer means business. This before-discharge action . . . affords a tangible indication to the employee that the Company will carry through with a warning."[90]

(2) *The rehabilitation factor.* From a retrospective vantage point, suspension has served for many arbitrators as a tangible guarantee that the employer used all means available to rehabilitate the grievant within the accepted range of disciplinary penalties. If the grievant failed to respond, it is not the employer's fault.

> *Arbitrator Jones:* Escalation of unwanted consequences is the crux of progressive discipline. The employee who has nonetheless remained uncorrectable despite those increasingly unwanted experiences is then, in all fairness, subject to discharge either as one who understands and still refuses to cooperate in the joint

[89] *Southern Gravure Serv., Inc.*, 89-2 ARB ¶8469 (Sergent, 1989).

[90] *Eastex, Inc.*, 69-2 ARB ¶8459, 4574–75 (1969) (absenteeism). See also *Rochester Tel. Corp.*, 45 LA 538 (Duff, 1965) (obscene language).

> enterprise or who simply cannot grasp the essentials necessary to perform the work properly assigned.[91]

Or in the words of Arbitrator Dworkin, "[d]ischarge is warranted only in such cases where corrective measures appear to be futile."[92] To prove that corrective measures short of discharge are futile, all such measures, including suspension, logically need to be tried.[93]

(3) *Punishment should fit the crime.* For those who take the view that "the punishment should fit the crime," a penalty system needs to include not only discharge for very serious misconduct (theft, assault, and the like) and warnings for minor offenses (such as a single lateness), but also a penalty of intermediate severity for offenses that fall somewhere in between (drinking on the job is a frequently encountered example).[94] Suspension is the obvious candidate, with variations in the length of suspension to accommodate offenses of intermediate gravity.[95]

Another View: Suspension Not Always Necessary. Not all arbitrators agree that suspension is a necessary component of progressive discipline. Cases in which discharge has been upheld in the absence of a prior suspension fall into one of these two categories:

(1) *Where the company has established a formal "warnings only" penalty system.* Warnings-only systems of progressive discipline are based on the dual premise that the heart of progressive

[91] *Pete Pasquinelli Co.*, 68 LA 1068, 1971 (1977) (leaving work).

[92] *Babcock & Wilcox Co.*, 41 LA 862, 866 (1963) (absenteeism).

[93] Among many other cases that take this line, see, e.g., *Rexall Drug Co.*, 65 LA 1101, 1105 (Cohen, 1975) (garnishment, other violations): "Grievant had previously been suspended for disciplinary reasons. Therefore, following the concepts of progressive discipline, discharge is the only remaining discipline left to the Company." See also *Smith & Wesson-Fiocchi*, 60 LA 366 (Traynor, 1973) (absenteeism and offensive body odor leading to complaints by coworkers); *Colgate-Palmolive Co.*, 64 LA 397 (Allen, 1975) (insubordination); *I. Schumann Co.*, 65 LA 674 (Cohen, 1975) (refusal to work overtime); *Memphis Light, Gas and Water Div.*, 77-1 ARB 8202 (Flannagan, 1977) (unauthorized reconnection of personal utility service). And see "last straw" cases cited in note 112 *infra*.

[94] See, e.g., *Packaging Corp. of America*, 56 LA 856 (Anrod, 1971), where the arbitrator concluded, "It is axiomatic that the penalty must fit the offenses committed by the Grievants," and found that a disciplinary suspension would be an "equitable, fair and just penalty" for drinking that does not lead to intoxication.

[95] See, e.g., *General Elec. Co.*, 74 LA 578 (Schor, 1980), for a three-part system of progressive discipline that divides misconduct into (1) misconduct serious enough to warrant summary discharge; (2) less serious misconduct that justifies a reprimand accompanied by a one-week suspension; and (3) relatively minor offenses that call for no suspension but only written warnings.

discipline is notice and that, to be effective, notice need not be punitive in the sense or depriving the employee of his earnings. Indeed, warnings-only systems have been applied most frequently in the case of absenteeism, for the reason that most (though not all) absenteeism is due to illness, an involuntary condition that is unresponsive to punitive measures.[96]

Logically, a warnings-only system is effective to the extent that it fulfills the critical function of giving notice. That means that the number of steps leading to discharge must be clearly spelled out;[97] that the system must be consistently applied; and that employees must be informed clearly and unequivocally at each step where they stand and, most critically, at what point another infraction will result in discharge. The importance of notice in warnings-only systems has been emphasized by Arbitrator High.

> I appreciate that technically Grievant was on notice of the possibility of discharge upon the accumulation of his fourth offense within 12 months. I find, however, that the lack of a progressive nature in this provision makes it all the more important that the imminence of discharge, in fairness, be underlined to the Grievant before he accumulated the fourth violation.[98]

(2) *Where the employer has been "patience personified."*

[96] For cases supporting this rationale, see note 135 *infra*. Cases in which discharge for absenteeism has been upheld, without the necessity of a prior suspension, include *Pacific Tel. and Tel.*, 32 LA 178 (Galenson, 1959); *Cannon Elec. Co.*, 46 LA 481 (Kotin, 1965); *American Brakeblok Div., Abex Corp.*, 52 LA 484 (Wagner, 1969); *Sterling Drug, Inc.*, 70-1 ARB ¶8033 (Berkowitz, 1969); *Koenig Iron Works, Inc.*, 53 LA 594 (Ray, 1969); *Globe-Union, Inc.*, 57 LA 701 (High, 1971); *Doxsee Food Corp.*, 57 LA 1107 (Farinholt, 1971); *Beaunit Fibers*, 71-2 ARB ¶8455 (Amis, 1971); *Avco Corp.*, 64 LA 672 (Marcus, 1975); *Husky Oil Co.*, 65 LA 47 (Richardson, 1975); *Hoover Ball and Bearing Co.*, 66 LA 764 (Herman, 1976); *Pacific Southwest Airlines*, 70 LA 833 (Jones, 1978). The contrary view is taken in *Park Prods. Co.*, 68-1 ARB ¶8330 (Kates, 1968), and *Harsco Corp.*, 70-2 ARB ¶8757 (Klein, 1970), and in a number of cases where the contract expressly mandated suspension as a progressive discipline step, including *Babcock & Wilcox Co.*, *supra* note 92; *Amerace Corp.*, 68-1 ARB ¶8238 (Roberts, 1968); *Eastex, Inc.*, *supra* note 90; *Cleveland Burial Vault Co.*, 69-2 ARB ¶8554 (Kallenbach, 1969); *Niagara Mach. & Tool Works*, 76 LA 160 (Grant, 1981). For an example of an accepted warnings-only system not restricted to absenteeism, see *General Elec. Co.*, *supra* note 95, where the system provided that four reprimands for minor infractions would result in discharge.

[97] *Canton Drop Forging & Mfg. Co.*, 80-2 ARB ¶8450 (Kabaker, 1980) (absenteeism and abuse of washup time).

[98] *Wolf Mach. Co.*, 72 LA 510, 513 (1979) (various rule infractions). See also, e.g., *Philips Petroleum*, 64-3 ARB ¶8907 (Mittenthal, 1964); *Kaiser Aluminum & Chem. Corp.*, 68-2 ARB ¶8606 (Hebert, 1968) (absenteeism); *General Elec. Corp.*, 69 LA 707 (Jedel, 1977) (unauthorized break, other misconduct).

EXAMPLE: During her three years of employment, according to her supervisors, a practical nurse had been unable to get along with many patients, had failed to master routine nursing procedures, had reacted with hostility to instructions and suggestions, and had just not "carried her weight." Counseling and "talkings to" by her superiors had made no impression on her. When the hospital finally discharged her, the union argued that suspension or perhaps transfer to another department should have been tried as a last resort to persuade the nurse to mend her ways.

Some arbitrators might have agreed with the union. But here, looking at the nurse's deplorable record, the arbitrator found not a shred of evidence to suggest that suspension would have done any more to improve her attitude than the intensive counseling the hospital had already given her. Notice, too, was a factor: "[The grievant] could not have been lulled into a false sense of security, in view of the numerous times she was spoken to. She must have known about the various "incidents" testified to, as they were called to her attention and corrected as they occurred. By giving her more than average help, over a longer period of time, her supervisors should be praised—not faulted." Discharge was sustained.[99]

This case exemplifies an argument that is heard with some frequency. The employer says, "Don't blame us for not being hard on this employee. We bent over backward to give him a chance." Essentially what it is saying is, "We're good guys." One might say that when an employer does not give proper notice or does not apply a suspension when it should, there is an implication of bad faith and underhanded dealing. Arbitrator Stouffer has addressed this point, holding that when there is ample evidence that this is not the case, the conclusion should be that the employer simply has been patient and *is* a "good guy."

> It appears that all of the Company's prior reprimands were justified; at least no grievances were filed contesting the same. The Company's reluctance to impose progressive disciplinary layoffs on grievant for past misconduct does not indicate negligence on its part. It indicates patience and willingness to help the grievant. The Company should not be criticized for this.[100]

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[99]*Elizabeth Horton Memorial Hosp.*, 74-2 ARB ¶8588 (Sandler, 1974).

[100]*Pretty Prods., Inc.*, 51 LA 688, 691 (1968). Arbitrator Stouffer took the same position in *American Cyanamid Co.*, 68-2 ARB ¶8674, 5341 (1968) (sleeping on job), where he quoted Arbitrator Kreimer as follows:

> There can be no doubt that every one of the Company's prior reprimands was thoroughly justified. Certainly the Company's reluctance to inflict progressive disciplinary layoffs to Grievant for his wrong-doings cannot be attributed to weakness. Rather, it indicates patience and strength, a willingness to help Grievant, not to hurt him. For this the Company cannot and should not be criticized."

In agreement, see *Jaeger Mach. Co.*, 55 LA 850 (High, 1970), where the arbitrator declined to penalize the employer for its leniency in withdrawing the grievant's prior suspensions; and *Avco Corp.*, *supra* note 96.

Number and Length of Suspensions

The conventional wisdom on disciplinary suspensions, as expressed by Arbitrator Duff, is that "the Company should impose layoffs of increasing degree" when an employee fails to respond to reprimands.[101] But exactly how many suspensions? And should a suspension be one day, three days, or three weeks? Arbitrator Jonathan Dworkin has suggested that 30 days is the outside limit for a corrective suspension, and that any longer suspension is punitive.

> A two-month suspension for negligence . . . stands out as arbitrary and punitive. If correction was the goal, it is unreasonable to believe that the second month . . . added any corrective influence . . . . Stated another way, if a 30-day suspension was not going to remedy Grievant's faulty performance, it is clear that the faults were not going to be remedied. In such case, Grievant should have been dismissed.[102]

Arbitrator Justin has proposed that a suspension should be not less than three working days and not more than 10 days, reasoning that the corrective effect of a disciplinary suspension derives from the shame that an employee feels when he has been suspended. Less than three days away from work, Justin suggested, does not provide enough time for the suspension to sink in; furthermore, an employee can "explain away" a day or two off to his family and friends more easily than a longer period of time. On the other hand, more than 10 days off, in Justin's view, becomes more punitive than corrective.[103]

Some arbitrators take the position that if misconduct is proved, selecting the appropriate penalty is exclusively the function of management, and the arbitrator has no authority to modify that penalty. Where the penalty is discharge, a majority of arbitrators do not hesitate to substitute a lesser penalty if in their judgment discharge was unreasonably harsh. Where the

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[101]*Armco Steel Corp.*, 52 LA 101, 104 (1969) (poor overall record).

[102]*Red Cross Blood Serv.*, 90 LA 393, 397 (1988).

[103]J. JUSTIN, HOW TO MANAGE WITH A UNION 420–21 (1969).

original penalty was something less than discharge, and the impact on the employee not so drastic, however, those same arbitrators, like leopards changing their spots, often switch to the position that the arbitrator has no business substituting his or her judgment for that of management. As Sanford Kadish has put it,

> it is in reviewing relatively fine differences in punishments that these objections have their greatest force. Is the proper discipline a reprimand or a one-day lay-off? A two-day lay-off or a week? Here there are no substantial standards for the arbitrator to apply beyond protecting against inconsistency with past practice and unfair surprise where the practice is altered, and assuring equal treatment for like cases.[104]

Arbitrator Shulman is often cited in support of the proposition that arbitrators should follow a strict hands-off policy when the appropriate length of suspension is in issue:

> Even when all the circumstances are considered, the exact size of the penalty is still a matter of judgment. . . . If the penalty for a particular violation may reasonably range from one week to one month's lay-off, for example, two different persons might very well choose two different penalties, one a week, the other perhaps two weeks. But the Umpire does not have the power to substitute his judgment for that of the company in all cases and compel the acceptance of the precise measure of discipline which the Umpire would have imposed had he had the initial responsibility for discipline. . . . His power is only to modify penalties which are beyond the range of reasonableness, and are unduly severe.[105]

But one reading of Shulman suggests that he is riding two horses at the same time. With one hand, Shulman "gives" to management, by stating that an arbitrator has no power to substitute his or her judgment for that of management so long as the penalty is within the "range of reasonableness"; but he "takes away" with the other hand, by implicitly retaining the authority to decide what the range of reasonableness is. Shulman thus offers only a conditional answer when the arbitrator (or employer) asks what penalty is appropriate for a given of-

[104]S. Kadish, *The Criminal Law and Industrial Discipline Sanctioning Systems: Some Comparative Observations*, LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS 143–44 (Proceedings of the 17th Annual Meeting, National Academy of Arbitrators 1964).

[105]*Ford Motor Co. and UAW*, Opinion A-2 (1943), cited in, among other opinions, *Jackson County Medical Care Facility*, 65 LA 389, 393 (Roumell, 1975) (unbecoming conduct); and *Grand Haven Brass Foundry*, 68 LA 41, 45 (Roumell, 1977).

fense. When, for example, the employer has imposed a five-day suspension, the arbitrator who feels that a three-day or even a one-day suspension would have been long enough can avoid the uncomfortable feeling of appearing to be arbitrary simply by invoking the Shulman view that management's judgment should be respected. The same would apply when the question was how many suspensions should be imposed prior to discharge.

Take a typical set of facts: The grievant was discharged after his third refusal to work Sunday overtime. After the first refusal, he was reprimanded; after the second, he was suspended for three days. The union argued that, at most, another three-day suspension would have been appropriate. But the arbitrator refused to step in. "It is arguable," he observed, "that another disciplinary step short of discharge might have been taken or that another management might have used a different combination of penalties." But the issue was whether there was just cause for the grievant's discharge. He had repeatedly refused to comply with legitimate directives to work on Sunday; there were no extenuating circumstances to justify his refusal; and the penalty was neither arbitrary nor capricious. Under these circumstances, another suspension was no more appropriate a penalty than discharge.[106]

But change the facts somewhat: Say that the grievant had been reprimanded for a first offense of refusing overtime and suspended for 30 days for a second refusal, and that the issue before the arbitrator was whether the 30-day suspension was proper. For at least some arbitrators, the loss of 30 days' wages might well be a penalty outside the "range of reasonableness" for the misconduct in question (or "an abuse of discretion" or "arbitrary and capricious"), and the just cause standard would require the substitution of a shorter suspension. The implication of the Shulman view for management, then, is that the number and length of disciplinary suspensions is a matter of management discretion—but only within limits.

Discharge for Cumulative Misconduct

The "Last Straw" Case

Here is a scenario that arbitrators have experienced many times: Over a period of time, an employee builds a record of

[106]*Yale Univ.*, 52 LA 752, 754 (Dunlop, 1969).

unsatisfactory conduct, in which no incident standing alone (although each violates a rule) is of such moment as to warrant discharge.[107] Or perhaps the various prior incidents, or some of them, are more serious but none has inspired the penalty of discharge for one reason or another. Finally, something happens, maybe only a little infraction in itself, and the employer decides that enough is enough and discharges the employee for the most recent offense as well as for the totality of past infractions.

These are what are referred to as "last straw" or "rain on the roof" cases.[108] From one perspective, if "last straw" is defined very generally as the last incident of misconduct that leads to discharge, most discharges would fall into this category. But what is typically meant by last-straw cases is not cases where the last act is very serious in itself.[109] Instead, the term "last straw" is reserved for situations in which the last event or incident is a trifle. An example is the case of an employee who had a tiff with his shop steward. This would not have justified discharge standing alone, but his conduct over the preceding two-month period, in which lesser penalties had been repeatedly given, demonstrated that further efforts at corrective discipline would be futile.[110]

Or an employee engages in all sorts of acts which in themselves are not misconduct but are inappropriate in the workplace. For example, an employee leaves a note with his time card requesting a date with a female payroll clerk; when asked why he is riding a piece of equipment he does not belong on, he responds that he is "freaking out, man"; he leaves his machine during working hours, stands in the doorway gazing outside, and, when asked what he is doing, replies, "I'm looking at the sunset"; and while doing his work, he merrily sings and hoots

[107] *National Fireworks Ordinance Corp.*, 20 LA 274 (Roberts, 1953) (uncooperativeness, troublemaking); *Ebinger Baking Co.*, 47 LA 948 (Singer, 1966) (varied misconduct).

[108] For the spectrum of "last straw" cases, see *Rowe Mfg Co.*, 36 LA 639 (Turkus, 1961) (improper attitude, conduct, performance); and *Great Atl. & Pac. Tea Co.*, 41 LA 887 (Cahn, 1963) (overstaying lunch period, time card violations, past record). For "last straw" cases where discharge was not sustained either because misconduct was not sufficiently proved or progressive discipline was not applied, or for other reasons, see *Abbott Linen Supply Co.*, 35 LA 12 (Schmidt, 1960); *Northwestern Bell Tel. Co.*, 37 LA 605 (Davey, 1961); *Ohio Crankshaft Co.*, 48 LA 558 (Teple, 1967).

[109] See, e.g., *Birmingham-News Co.*, 79-1 ARB ¶8039 (Grooms, 1978); and *Neville Chem. Co.*, 74 LA 814 (Parkinson, 1980), among many other cases.

[110] *American Motors Corp.*, 51 LA 945 (Dunne, 1968).

so loudly that the foreman warns him, "You just can't be making loud noises in this department."

This is the so-called "Peck's Bad Boy" case. This employee is not necessarily a "bad apple"—what sets him apart is a "can't get it together" personality and attitude. At some point the employer reaches the end of its patience and gets rid of the employee. And even though the violations with which he is charged may be minor (or not even improper in another setting), discharge is not necessarily an overly stringent penalty. That is so because even petty infractions can build up to a critical point where the employee has become such a liability that the employer cannot reasonably be expected to tolerate his behavior any longer.

> *Arbitrator Koven:* Cause for discharge is not found in his final [act of misconduct], but in the established fact that he is incorrigible. It is upon this logic that the grievant's conduct, though in each instance a picayunish matter, in its totality amounted to a serious matter and a burden which one could not expect the Company infinitely to sustain.[111]

Typical Questions in Last-Straw Cases

Is There a Genuine Last Straw? "[A]n employee cannot be penalized by discharge merely for a past record unless he has committed a present offense";[112] and because an employee was fundamentally blameless in the incident that provoked his discharge (leaving work early without permission), no discipline was called for despite his lengthy history of rule violations and written warnings.[113] "[T]he final act . . . must stand by itself as a proper and justifiable trigger for some discipline. Unless this factor is present, . . . past steps in a progressive discipline program become meaningless."[114]

[111] *Ampex Corp.*, 44 LA 412, 416 (Koven, 1965). See also *Electronic Corp. of America*, 3 LA 217 (Kaplan, 1946); *Rochester Tel. Corp.*, 45 LA 538 (Duff, 1965); *Arden Farms Co.*, 45 LA 1124 (Tsukiyama, 1965); *Friden , Inc.*, 52 LA 448 (Koven, 1969); *Pacific Bell*, 87-1 ARB ¶8037 (Killion, 1986).

[112] *Turco Mfg. Co.*, 74 LA 889, 895 (Penfield, 1980) (cumulative misconduct, abuse of union office). See also *Wyandotte Chem. Co.*, 70-2 ARB ¶8830 (Ellman, 1970) (absenteeism); *Whirlpool Corp.*, 65 LA 386 (Gruenberg, 1975) (possession of marijuana); *Alabama Dep't of Mental Health*, 66 LA 279 (Spritzer, 1976) (absenteeism).

[113] *Ogden Food Serv. Corp.*, 75 LA 805 (Kelman, 1980) (leaving plant without permission).

[114] *Overhead Door Co.*, 70 LA 1299, 1303 (Dworkin, 1978) (absenteeism, excused absence).

A garden-variety "last straw" is present when an employee indulges in the last of several refusals to obey a reasonable order. For example, take the "melancholy list of charges" against a 21-year employee who, over a long period, consistently refused or loudly protested her work assignments, constantly complained about being overworked, talked incessantly in a loud voice, refused to stop terrorizing the secretaries whom she supervised, and finally on one fine day could not resist producing the "last straw" that justified her dismissal by refusing to help one of her colleagues.[115]

Do All the "Straws" Have to Be of the Same Type? The answer, of course, is no. Take this situation: A waitress was reprimanded for loafing; next she was discharged for refusing an order but then was reinstated with a reprimand; next she was cautioned about leaving the job without permission; she was then given a reprimand for refusing a work assignment together with a final notice; after which she was cautioned for chronic tardiness. Then came the day when she threatened a customer with a knife because, she claimed, he had spit at her. Result: Enough is enough.[116]

Can the Arbitrator Review Past Incidents, as Well as the Last Straw? As noted in Chapter 5, arbitrators expect the charge for which the employer offers proof to be the charge for which discipline was originally imposed, not something the employer cites for the first time at the arbitration hearing. Thus, "[i]t is well-settled that when an employee is discharged for a particular alleged violation and no mention is made of his past record, the latter should be considered later only in connection with the quantum, or relative severity, of the discipline meted out."[117]

"Last straw" cases by their very nature involve a course of past and cumulative misconduct. Nonetheless, the rock-bottom

[115]*National Council of Jewish Women, Inc.*, 57 LA 980 (Scheiber, 1971). But compare cases along the same lines where discharge was overturned: *Magnavox Co.*, 29 LA 305 (Dworkin, 1957); *Metropolitan Transit Auth.*, 39 LA 855 (Fallon, undated); *Revere Copper and Brass, Inc.*, 45 LA 254 (McCoy, 1965); *Olin Mathieson Chem. Corp.*, 49 LA 573 (Belshaw, 1967).

[116]*Prophet Foods Co.*, 55 LA 288 (Howlett, 1970). See also *W-L Molding Co.*, 72 LA 1065 (Howlett, 1979) (assault on vending machine). But compare *Olin Mathieson Chem. Corp.*, *supra* note 115.

[117]*American Airlines, Inc.*, 46 LA 737, 739 (Sembower, 1966). By the same token, said the arbitrator in *Martin-Brower Co.*, 89-1 ARB ¶8221 (Miller, 1988), the employer's failure to notify an employee of an alleged infraction or to reprimand him for it precludes use of that infraction to support disciplinary action for a later infraction.

requirement is still the same as in cases that involve only a single incident.

> Since it is basic that a dischargee should know at the time he files his grievance what he is accused of doing wrong, so that he may make proper remonstrance and prepare his case, the aspect of his prior record should appear in the charge itself in order to be an appropriate consideration in direct connection with whether or not he is "guilty."[118]

Often the shoe is on the other foot. Rather than the employer seeking to display the grievant's employment history before the arbitrator, it may be the grievant who points to his or her past history and argues that some of the earlier absences, for example, should have been excused and, indeed, that the prior warnings were unwarranted. The employer can then be expected to argue that any such offered evidence is inadmissible because the grievant never grieved any of the past warnings. And the arbitrator would at first agree: "[I]n most instances, it would be improper for an arbitrator to expunge the aspects of an employment background which had not been submitted to the grievance procedure with requisite timeliness."[119]

But that might not be all. Some arbitrators would go on to say that because, as a "fact of industrial life," employees do not contest such warnings, some latitude is in order. An arbitrator "may justifiably review prior discipline to determine whether it should be permitted to form a link in the chain leading to suspension or discharge. . . . Evidence which refutes the presumption that former discipline was proper must be such as creates a positive conviction contradicting personnel records."[120]

Does Consideration of the Employee's Whole Record Amount to Double Jeopardy?[121] When an employee is charged with a single act of misconduct, the question of double jeopardy is not likely to arise. But where his problem is a course of conduct and past

[118]*American Airlines, Inc.*, *supra* note 117.

[119]*Overhead Door Co.*, *supra* note 114.

[120]*Id.*

[121]Another type of double jeopardy problem, the overlap between criminal penalties and industrial penalties, was discussed in Ch. 5, pp. 290–92. For additional double jeopardy issues, see F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 677–79 (4th ed. 1985); and FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 301–04 (R. J. Schoonhoven, ch. ed., 3d ed. 1991). These issues include the classic situation where two penalties are imposed for the same offense and the difference between double jeopardy and suspension pending investigation of suspected misconduct.

record culminating in a last incident for which he is punished, a claim of double jeopardy is more likely to be asserted.

Take the case of an employee who failed to report for his scheduled shift and was thereupon discharged. His prior bad record of attendance and punctuality was held admissible in arbitration even though some of the evidence put forward was previously presented at the arbitration in which a prior three-day suspension was protested. No double jeopardy was found.

> [T]he very nature of the offense is cumulative and significant as such. If the earlier grievance (i.e. the three day suspension) had been sustained, then that decision would perforce, have knocked out the supporting props and those papers could not be accorded the same respect here that they are if the grievance is overruled, as was the case.[122]

> *Arbitrator Tsukiyama:* Since penalties become progressively harsher with each repeated offense, progressive discipline is necessarily cumulative [cites], necessitating review and consideration of any past record of previous offenses, prior warnings and discipline in determining the propriety of discharge and penalty. Thus, the argument against "resurrection of past offenses and double jeopardy" is inapplicable to a discharge coming at the culmination of management's efforts toward corrective discipline . . . .[123]

When Is Enough Enough?

Aside from the specific issues that last-straw cases tend to raise, such as those discussed above, the perennial and underlying question is at what point can the employer feel reasonably secure in saying "Halt—that is enough!" Obviously, the answer cannot be reduced to a simple formula since each case has its own particular facts and flavor. However, setting up a system in advance (for example, one under which four violations of company rules within a 12-month period will result in discharge) is an effort to define when "enough is enough." Such a system

[122]*American Airlines, Inc., supra* note 117, at 741:
The familiar statutes in many states providing for suspension of an automobile driver's license for three rolling traffic law violations within a certain period, is an example [of no double jeopardy]. If the motorist successfully challenges in court any of the first two violations, it is wiped out. Otherwise, it persists and provides a cumulative foundation for the ultimate forfeiture.

[123]*Arden Farms Co.*, 45 LA 1124, 1130 (1965). Omitted citations are *Michigan Seamless Tube Co.*, 24 LA 132 (Ryder, 1955); *Pacific Press Ltd.*, 42 LA 947 (Hebert, 1964).

is itself intended to define when enough is enough—the last step becomes the "last straw" for all employees similarly situated.[124] (The intervening consideration, that is, reconciling the problem of uniformity and consistency with a system of progressive discipline, was discussed above at pp. 393–97).

Even in the absence of a self-executing system of standards, the fact that an employee has been frequently reprimanded and finally suspended because there has been no improvement becomes evidence that the employer has gone as far as can reasonably be expected—thus suggesting the parameters of "enough is enough."

> **EXAMPLE NO. 1:** For four years an employee violated the rules as a way of life. He refused to take orders; interpreted the rules his own way; observed only the rules he liked; was rude to his superiors; and when he was caught eating in the kitchen in violation of the rules became abusive and banged pots and pans. All of this ultimately earned him 11 warning notices and two disciplinary suspensions. Finally came the "last straw." He was ordered to appear at a disciplinary hearing for using the telephone for personal business, and he failed to show up. At this point the employer threw up its hands and fired him.

Despite the attention he had received through counseling, warning, and suspension, this employee by his own actions proved himself to be incorrigible. "This record leads the Arbitrator to conclude that progressive, corrective disciplinary procedures utilized by the Employer proved to be futile only because [the grievant] refused to accept the concept that an employer possesses the right to issue legitimate orders and to expect employee compliance."[125]

[124]Having thus loaded the gun, the employer must be careful not to pull the trigger prematurely. In *Master Builders, Inc.*, 92 LA 1021 (Curry, 1989), an employer which had adopted an absenteeism-control plan that provided for discharge only after 13 absences in a 12-month period fired an employee for failing to improve his attendance record after several warnings, charging him with chronic absenteeism. The employee, however, had been absent only eight times, leading the arbitrator to reduce the penalty to a three-day suspension—the penalty specified by the plan itself after eight absences. The arbitrator agreed with the employer's contention that the plan was not its sole weapon against absenteeism, but he found that this employee's pattern of absence did not amount to chronic absenteeism. Rather, he said, the absences were of the type which the attendance program was intended to address.

[125]*St. Mary's Hosp.*, 68 LA 1199, 1202 (Falcone, 1977). See also *Thiokol Chem. Corp.*, 52 LA 1254 (Williams) (pattern of filing groundless charges of wrongful acts, including racial discrimination, conspiracy, defamation of character, and unsafe practices, held ground for discharge).

EXAMPLE NO. 2: Three times an employee failed to wear his hard hat in violation of a rule calling for discharge for the fourth violation. Three times he was disciplined—two warnings and a suspension. When asked if he was going to wear his hard hat in the future, he said he was not—that the rule was stupid and the hat gave him a headache. As a result he was discharged.

This case puts in focus the niggling problem of projecting what a particular employee is likely to do in the future. Will he continue his old ways, or will he finally shape up? The arbitrator, like it or not, is in the business of being a predictor. In this case the arbitrator chose to conclude that the book was not yet closed on this grievant.

> Nothing in the contract permits Company to substitute an employee's attitude, charges of insubordination not having been made, for a step of the discipline procedure. . . . [F]or one to say he'll not obey a rule does not mean that thereafter he'll actually disobey it. "Second thoughts" by the employee . . . cannot be discounted as factors encouraging compliance with the rule.[126]

Compare this case to one in which an employee issued a threat to "throw a fit" and to kill the superintendent. Discharge was held to be justified.[127] The difference is that here the threat was *to do* something bad (*malum in se*), whereas the threat not to wear a safety hat was a threat *not to do* something that was required (only *malum prohibitum*). The threat to kill the superintendent became an act in itself by virtue of its effect upon the person to whom it was directed: it put that person in apprehension. The vow not to wear a hard hat, in contrast, did not put anyone in apprehension—it was simply a "non-act." Thus, where an act has already taken place, a penalty may or may not be applied, but the question of prediction does not arise. It is only non-acts that raise the question of prediction.

Last-Chance Agreements

A special kind of last-straw situation occurs when the employee has been put on notice that one more violation of company rules—perhaps of the same rule he or she previously violated, perhaps of *any* company rule—will be curtains.[128] In other words, the employee has been told in advance that further misconduct will be regarded as the "last straw" and has acknowledged that this will be the case. Such a "last chance" agreement often is the result of a settlement negotiated by the union on behalf of a grievant whose misconduct clearly warranted discharge.

Arbitrators have held that last-chance agreements, as a general rule, are not subject to the usual requirements of just cause. To put it another way, violation of the last-chance agreement provides the "just cause" required for discharge. Arbitrator Jonathan Dworkin has explained: "[J]ust cause is not essential to the formation of a [an agreement]. A company and union could negotiate to eliminate the benefit. . . . A union also can enter into a last-chance bargain relieving an employer of some or all of its just-cause obligations to an employee." He continued:

> When encountering a last-chance settlement, an arbitrator can presume its validity even though it places the subject employee at a distinct disadvantage. It should be inferred that the settlement was negotiated in good faith to grant the employee something s/he could not otherwise achieve—continued employment. The arbitrator should recognize that there was a trade-off for the advantage—relinquishment of certain employment rights. . . . An employer would have no reason to enter into them if they were illusory or unenforceable.[129]

All this said, an employer does not have complete freedom in dealing with the employee working under a last-chance agree-

[126] *B. Green & Co.*, 81-1 ARB ¶8259, 4158 (Whyte, 1981). In *Allied Employers, Inc.*, 71-1 ARB ¶8078 (Kleinsorge, 1970), the arbitrator took the contrary position and sustained the discharge of an employee who had refused to comply with the employer's hair-length rule, holding that the rule was reasonable and that it made no sense to put the grievant back to work because he had already stated he would not comply with the rule.

[127] *Georgia Power Co.*, 76 LA 761 (Foster, 1981).

[128] For a discussion of the last-chance agreement as a form of notice, see Ch. 2, p. 64.

[129] *Butler Mfg. Co.*, 93 LA 441, 445 (1989) (insubordination). To similar effect, see *Joy Mfg. Co.*, 86 LA 517, 519–20 (Duff, 1986) (absenteeism): "The Company does not have to grant any Last Chance Agreement, and having granted it, it has no other obligation but to refrain from being arbitrary or capricious in revoking it." See also *Allied Maintenance Corp.*, 87 LA 121, 86-1 ARB ¶8240 (Duda, 1986) (improper checking of baggage); *U. S. Steel Corp.*, 87 LA 973 (Neyland, 1986) (alcohol-related absenteeism); *National Steel Corp.*, 88 LA 457 (Wolff, 1986) (failure by alcoholic to abide by rehabilitation program). But see *Northrop Corp., Aircraft Div.*, 96 LA 149 (Weiss, 1990), where the arbitrator held that an employee was improperly terminated for talking and leaving his post without permission, even though he had signed a last-chance agreement calling for his immediate discharge for any further offense. The current offenses were minor, the arbitrator pointed out, they were unrelated to the misconduct (absenteeism) that occasioned the last-chance agreement, and the employee had worked for the company for 10 years. See also *Monterey Coal Co.*, 96 LA 457 (Feldman, 1990) (last-chance agreement invalid insofar as it provides that any violation of terms will result in discharge without resort to "grievance, claims, arbitration, or lawsuit").

ment. It remains true that there must be *some* violation of company rules, however trivial, to justify discharge. And what looks like a violation to the employer may not be so viewed by the arbitrator. Take the shop steward who, after receiving a "final warning" that any further violation of written or unwritten shop rules would result in suspension or discharge, filed a spurious claim for overtime pay. The employer, viewing the filing as a dishonest act, discharged him. The arbitrator, on the other hand, pointed out that the mere filing of the claim, even if it was faulty and outrageous, was innocuous, especially since the supervisors who would have had to approve the claim were present at the meeting for which he was claiming overtime compensation. In the absence of clear evidence that the parties intended an unacceptable overtime claim to be regarded as an offense triggering discharge under the last-chance agreement, the arbitrator concluded that the discharge could not be allowed to stand.[130]

A further qualification is that extreme extenuating circumstances may be recognized by the arbitrator even if the violation of the last-chance agreement was clear-cut. An example is the case of an employee who was discharged for being absent without notice while working under a last-chance agreement. It turned out that the employee was faced with a serious family emergency—his pregnant wife had become violent and the employee feared for the safety of their two small children. To top it all, his wife had ripped the telephone out of the wall. Returning the employee to work, the arbitrator nevertheless refused to award him back pay on the theory that the employer was not financially responsible for the employee's problems.[131]

Absenteeism and Progressive Discipline

Absenteeism is probably the occasion for progressive discipline more often than any other type of misconduct, but what kind of

[130]*San Francisco Newspaper Agency*, 93 LA 322 (Koven, 1989). In *Ohio Dep't of Highway Safety*, 96 LA 71 (1990), Arbitrator Dworkin held that a last-chance agreement which held the grievant's discharge "in abeyance" on condition that she complete a rehabilitation program and refrain from further drug or alcohol abuse was unreasonable on its face and contrary to the just cause standard because it failed to specify an expiration date. But see *University of Mich.*, 96 LA 688, 690 (Sugarman, 1991), where the arbitrator ruled that a last-chance agreement "without a term continues in effect until the parties themselves modify, amend, or change it."

[131]*Chicago Transit Auth.*, 89-1 ARB ¶8129 (Goldstein, 1988).

absentee record it takes to justify the firing of an employee is not of concern here. All that need be said in this connection is that "[a]dmittedly, there is no precise standard for determining what is excessive absenteeism."[132] The focus in this section is the overall relationship of progressive discipline to absenteeism.[133]

> *Arbitrator Eaton:* [T]he general rule is that where a discharge is to be sustained for absenteeism there must be aggravated circumstances, formal notification to the employee of the consequences of further absences, and effort, either of consultation or progressive discipline, or both, to remedy the situation short of discharge. The last of these elements is of particular importance. It must be required that the employer make good faith efforts, over a reasonable period of time, to eliminate the cause of absenteeism before resorting to the "capital punishment" of discharge. This is particularly true in the case of an employee with long and satisfactory service to the company.[134]

What has been previously set forth with respect to progressive discipline as it applies across the board is incorporated here, so to speak, by reference. Absenteeism has already been discussed in reference to reasonable rules (pp. 139–42) and notice (pp. 63, 70).[135] In addition, the following points should be emphasized:

- An employer has the right to expect an employee to be available on a reasonably consistent basis and to take corrective measures if he or she is not.[136]
- "Once guidelines are established and publicized, only in 'extraordinary circumstances' may an employer disregard

[132]*Worthington Corp.*, 47 LA 1170 (Livengood, 1966).

[133]*Electric Hose and Rubber Co.*, 47 LA 1104 (Kerrison, 1967).

[134]*Peerless Laundry Co.*, 51 LA 331, 335 (1968).

[135]Absenteeism due to illness is covered in ELKOURI & ELKOURI, *supra* note 121, at 578–80. Absenteeism in general is discussed in J. R. REDEKER, DISCIPLINE POLICIES AND PROCEDURES 55–69 (1983); and by L. STESSIN, EMPLOYEE DISCIPLINE 67–86 (1960). An exhaustive compendium of citations on absenteeism is set forth in *Husky Oil Co.*, 65 LA 47 (Richardson, 1975). Another key case is *Sperry Rand Corp.*, 70-1 ARB ¶8149 (Kesselman, 1969). See also *American Airlines, Inc.*, 47 LA 266 (Dworkin, 1966); *Electric Hose and Rubber Co.*, *supra* note 133; *Park Prods. Co.*, 68-1 ARB ¶8330 (Kates, 1968); *U. S. Pipe and Foundry Co.*, 68-2 ARB ¶8665 (Seinsheimer, 1968); *Rockwell Int'l, Flow Control Div.*, 1975 ARB ¶8036 (Knee, 1975); *Central Tel. Co. of Va.*, 68 LA 957 (Whyte, 1977); *St. Francois County*, 77-2 ARB (Elbert, 1977); *Werner-Continental, Inc.*, 72 LA 1 (LeWinter, 1978); *General Mills, Inc.*, 78-1 ARB ¶8188 (Madden, 1978); *Union Carbide Corp.*, 74 LA 681 (Bowers, 1980).

[136]*Gerstenlager Co.*, 66-1 ARB ¶8331 (Teple, 1966); *U.S. Pipe and Foundry Co.*, *supra* note 135; *Carter-Wallace, Inc.*, 69-1 ARB ¶8372 (Kerrison, 1968); *General Mills, Inc.*, *supra* note 135.

his own guidelines. Otherwise, the guidelines would be meaningless."[137]

- A progressive discipline program will not necessarily be invalidated because it does not provide for suspension but jumps, after a suitable number of warnings, all the way to discharge.[138] Those who take this view argue that absenteeism due to illness cannot be corrected by traditional forms of progressive discipline.[139] Indeed, according to some arbitrators, absenteeism due to sickness is not subject to progressive discipline at all, since it is illogical to punish someone for being ill.[140] Only intermittent absenteeism, not chronic absenteeism, is governed by progressive discipline if so provided for in the contract.[141]
- The employer does not necessarily have free rein to do as it pleases with its progressive discipline system. For example, an employee cannot post an individual employee's work and attendance records for all in the plant to see since by doing so it may "subject the employee to irreparable, speculative, and conjectural harm by his fellow employees or any other observer."[142]

Demotion as a Penalty

Arbitrators disagree as to whether demotion is a legitimate form of penalty.[143] Decisions in particular cases have turned on

[137] *Metal Container Corp.*, 81-2 ARB ¶8610, 5652 (Ross, 1981). Illustrating this point is *Master Builders, Inc.*, 92 LA 1021,89-2 ARB ¶8583 (Curry, 1989), where the grievant was discharged after accumulating eight absences during a 12-month period although the absenteeism-control plan provided for discharge only after 13 absences. The employer argued that the grievant was guilty of chronic absenteeism and that it could resort to discharge under its inherent management rights. The arbitrator agreed that unusual circumstances might arise in which the plan would not apply. But in the grievant's case, the absences were of the type intended to be curbed by the plan, and a three-day suspension was the prescribed penalty after eight absences.

[138] *Hoover Ball and Bearing Co.*, 66 LA 764 (Herman, 1976).

[139] *Worthington Corp.*, *supra* note 132.

[140] *Atlantic Richfield Co.*, 69 LA 484 (Sisk, 1977), with additional citations. In *Airco, Inc.*, 84-1 ARB ¶8121, 3557 (Dworkin, 1984), the arbitrator upheld the discharge of an alcoholic who had repeatedly been absent, but he directed that the reason for termination be changed to "failure to carry out his responsibilities" rather than chronic absenteeism. Said the arbitrator: "[I]t was unfair to *discipline* the Employee for absenteeism which was not voluntary, but which was caused by an illness. The taint of discipline on Grievant's record was unwarranted."

[141] *Logan Metal Stampings, Inc.*, 53 LA 185 (Kates, 1969).

[142] *Electra-Gas Appliance Corp.*, 64 LA 1185 (Rinaldo, 1975).

[143] Many cases on both sides of this issue are cited in F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 565–69 (4th ed. 1985). Hill and Sinicropi, in REMEDIES IN

such issues as whether the demotion was temporary or permanent (permanent demotion sometimes having been regarded as unreasonable because it is comparable to an "indeterminate sentence"); whether the contract expressly or impliedly permitted demotion as a penalty;[144] whether the grievant was demoted for inability to perform his or her job duties satisfactorily or for some reason unrelated to job performance;[145] and whether progressive discipline had been applied prior to the demotion. The majority view is that demotion should not be used as a *disciplinary* penalty, but should be reserved for cases in which the employee has demonstrated an inability to perform his or her job.[146]

> *Arbitrator Platt:* But I do not believe that permanent demotion is a proper form of discipline where an employee's capabilities are conceded and his performance is generally satisfactory but where his attitudes of the moment are improper. For improper work attitudes—as experienced by occasional carelessness and failure to obey instructions—can usually be corrected by suspending or laying off the employee for a reasonable but definite period.[147]

ARBITRATION (2d ed. 1991), quote Arbitrator Volz to the effect that, where permitted by the contract, demotion is a more appropriate remedy than discharge for substandard work performance that is due to lack of mental or physical ability rather than to carelessness, indifference, etc., and cite *Sunshine Biscuits, Inc.*, 60 LA 197 (Roberts, 1973), as a case in accord with that position. In *Southwest Petro-Chem, Inc.*, 92 LA 492, 89-2 ARB ¶8323 (Berger, 1988), the arbitrator held that, although demotion may not be used as a form of discipline, an employer could properly allow an employee to return to a lower-rated job where the latter was guilty of a major violation of company rules and could have been terminated.

[144] Arbitrator Thornell, in *City of Omaha*, 86 LA 142, 143 (1985):

> As a general rule demotion is not a proper form of discipline, absent a specific contractual provision permitting such. This is because demotion must be related to an employee's ability to perform the work on a continuing basis in terms of his competence and qualifications. Discipline is properly related to infractions of rules or misconduct.

[145] An example of a case where demotion was held to be improper is *U.S. Army Tank-Automotive Command*, 93 LA 767 (Smith, 1989), where an employee demotion solely because he refused to admit fault in entering a non-work-related program into a government computer was held to be improper. Said the arbitrator: "Thus management has put the cart before the horse in requiring the grievant to accept fault and loss of his grievance, usurping the authority delegated to the Arbitrator, as a preliminary to its assessment of penalty."

[146] *Weyerhaeuser Co.*, 51 LA 192, 195 (Whyte,1968): "[A]rbitration authority is generally uniform to the effect that non-disciplinary demotions—that is, because of inability, lack of efficiency or lack of competence—is a management right limited only by the requirement that such action not be arbitrary, capricious or discriminatory." See also *Gilbarco, Inc.*, 87-2 ARB ¶8338 (Flannagan, 1986) (inability to perform).

[147] *Republic Steel Co.*, 25 LA 733, 735 (1955) (careless workmanship). Platt went on to point out that demotion under such circumstances is inconsistent with the concept of progressive discipline, which has as its fundamental purpose the correction of faults

A problem sometimes faced by an employer is that of the employee who returns to work following rehabilitation from alcohol or drug dependency. In many cases the contract, or the terms of the rehabilitation agreement, will specify that the employee is to be returned to his or her former job or to an equivalent job. But what if this is not the case? In such a situation, the arbitrator ruled that it was proper to reinstate the employee to a lower-paying, temporary nonunit job since the employee's seniority was unimpaired and he could bid on unit jobs as they became available.[148]

On occasion, the arbitrator's use of the remedy power may result in the grievant's demotion. This occurs when a discharge is found to have been improper but the employer nevertheless proved to the arbitrator's satisfaction that the grievant was unable to do his or her job acceptably. In one such case the arbitrator directed the employer to reinstate a discharged employee to his former job because of his unblemished 14-year work record prior to his promotion, even though the employer had warned him that he risked discharge if he bid on the higher job.[149]

Seven Pitfalls in Progressive Discipline

1. The Off-the-Record Past Record

Discharge is difficult to support when past incidents of misconduct have not been brought to the employee's attention or made a matter of record. In part, this is a notice problem, as Arbitrator Dworkin clearly noted in the case of a journalist who had been discharged for, among other things, tardiness, excessive use of the telephone, uncooperative attitude, poorly written copy, and grammatical errors:

> Although the evidence does indicate that oral criticisms were voiced on some occasions, these were not made a matter of record, and the grievant was not aware that she was being subjected to

and behavior and not the imposition of "an indeterminate sentence" of punishment. See also *Metromedia, Inc.*, 46 LA 161 (Dworkin, 1965) (insubordination; refusal to sign memo concerning new company rule). Cases holding that if demotion is to be used as a disciplinary penalty, the principles of progressive discipline must be applied include *Safeway Stores, Inc.*, 78-2 ARB ¶8557 (Tyler, 1978); *Firestone Tire & Rubber Co.*, 74 LA 565 (Whyte, 1980) (poor work, making false accusations against supervisor).

[148] *E G & G Fla., Inc.*, 93 LA 1141 (Abrams, 1989).

[149] *Rohm and Haas Tex., Inc.*, 92 LA 850 (Allen, 1989).

> disciplinary action. . . . An employee should be permitted an opportunity to respond to corrective measures and guidance before a decision is justified that the employment relationship should be terminated.[150]

The employer that fails to put an employee's misconduct formally on record, with appropriate warnings and/or suspensions, also makes itself vulnerable to a later protest by the union that the employee's record was not really so bad. When, for example, a supervisor testified that an employee had been reprimanded for violating a rule against making personal telephone calls but could not cite one concrete violation or reprimand, the arbitrator drew the inevitable inference that any telephone violations the employee might have committed were insignificant and could not be held against her at a later time.[151]

2. Stale Past Record

Discharge may also be set aside, even if progressive discipline has previously been applied, if the grievant's last reprimand or suspension was too far in the past.

> *Arbitrator Ipavec:* There is a further consideration that the foregoing progression of discipline be within certain reasonable time limitations in that it has also been widely accepted that a rehabilitated employee . . . may have any prior discipline for poor performance, ignored; and the employee's slate to be, so to speak, clean.[152]

What is "too far in the past"? Sometimes the contract or a company rule answers that question by providing, for example, that any disciplinary action older than one year will be erased

[150] *Times Publishing Co.*, 40 LA 1054, 1059 (1963). See also *Wade Mfg. Co.*, 21 LA 676 (Maggs, 1953) (grievant not advised oral warnings could be held against him in future); *Standard Shade Roller Div.*, 73 LA 86 (Dawson, undated) (statement to grievant that he could be fired for refusing to work overtime given too casually to qualify as a formal warning); *U. S. Steel Corp.*, 68-2 ARB ¶8772 Dybeck, 1968). Additional cases in this line are cited in F. ELKOURI & E. A. ELKOURI, *supra* note 143, at 680.

[151] *San Mateo Restaurant-Hotel Owners Ass'n*, 59 LA 997 (Kenaston, 1972). See also *Patton Sparkle Market*, 75 LA 1092, 1095 (Cohen, 1980) (lack of documented warnings taken to show prior misconduct "did not reach a level of seriousness to warrant the issuance of a written warning"); *Abilene Flour Mills Co.*, 61-1 ARB ¶8049 (Granoff, 1960) (damage to company property); *Licek Potato Chip Co.*, 82-1 ARB ¶8074 (Belcher, 1981) (incompetence, inefficiency); *Martin-Brower Co.*, 89-1 ARB ¶8221 (Miller, 1988) (assault on fellow employee).

[152] *Belmont Hotel*, 74-1 ARB ¶8316, 4189 (1974) (incompetence, inefficiency).

from an employee's record and not be made the basis of a later, more severe penalty.[153] Otherwise, it depends.

EXAMPLE: An employee of some 13 years' seniority maintained an unblemished record for the first 11 years or so. Then, however, she received a written warning for being intoxicated on the job. About 15 months later, when she again showed up for work intoxicated, the employer discharged her, claiming that she had been observed under the influence on at least one other occasion and that she had been prohibited from leaving the premises during her lunch hour for fear that she would return intoxicated.

Was this a past record justifying discharge? It might have been, were it not for two considerations. First, the employee's written warning had been given more than a year prior to her discharge. Second, none of the other drinking violations the employer cited had ever found their way into her personnel file. "Her past record indicates that this is not the first occurrence. At the same time her official work record . . . would indicate that the problem has not been extreme. She has received only one written warning concerning her drinking . . . ." For an employee with long and, until recently, creditable service, that one relatively old warning was not enough to justify discharge; a suspension would have been a more reasonable penalty.[154]

3. No Opportunity for Improvement

Arbitrator Dawson: The concept of a warning implies an opportunity for correction. This in turn implies opportunity for sober reflection and in many cases resolves itself into a question of how much time has elapsed between the warning and the final discharge. . . . It is not permissible to warn and discharge an employee in the same act if not the same breath.[155]

EXAMPLE: An employee was discharged for failing to follow his foreman's direction to clean the filters in the air conditioning system. The union pointed out that the discharge violated the contract, which required at least two warning notices prior to discharge. Conceding the point, management reinstated the employee and substituted two warning letters for the discharge, the first referring to several earlier failures to follow orders and the second, dated the next day, reprimanding the employee for the filter-cleaning episode. A few days after returning to work, the employee was again discharged for failing to carry out his work assignments properly.

The timing of the two warnings gave the arbitrator a problem. "It is axiomatic that the purpose of such warnings is to enable the employee to improve his performance so that he may not incur suspension and/or discharge." The two letters technically may have satisfied the two-warnings requirement; but because the second letter followed the first in quick succession, the employee did not have a second opportunity to improve as the parties intended. So that letter was invalid as a step in progressive discipline, and the employee's discharge was set aside.[156]

A similar situation arose where, for two days running, an employee refused to comply with a new procedure requiring employees to submit to lunch box inspections. The employer determined that he should be given a written warning for the first refusal and a suspension for the second; the employee was told simultaneously of both disciplinary actions and filed a grievance protesting the suspension. Here, too, the employee prevailed on the theory that the employer had not given him an adequate opportunity to comply with the lunch box rule.[157]

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[153] *E.g., Champion Spark Plug Co.*, 67 LA 254 (Kates, 1976) (firearms violation, tardiness, etc.); *Champion Spark Plug Co.*, 93 LA 1277 (Dobry, 1989) (insubordination).

[154] *Eden Hosp.*, 56 LA 319, 320 (Eaton, 1971). In *Huntington Chair Corp.*, 24 LA 490, 492 (McCoy, 1955), the arbitrator found that management acted unreasonably when it discharged the grievant for leaving work three minutes early, when his work had been completed, adding: "This is particularly true where the last offense prior to this incident had occurred 11 months before. This is not the exercise of corrective discipline." See also *Ideal Cement Co.*, 13 LA 943 (Donaldson, 1950) (loafing); *General Controls Co.*, 34 LA 432 (Roberts, 1960) (poor work record); *Interstate Brands-Four S*, 76 LA 415 (Adler, 1981) (leaving work before completing overtime assignment); and additional cases cited in F. ELKOURI & E. A. ELKOURI, *supra* note 143, at 680. For a contrasting ruling, see *Wells Badger Indus., Inc.*, 67 LA 56 (Jones, 1976) (fact that suspension was year old did not preclude employee's discharge for continued excessive absence, where contract made no provision for removal of suspensions from record).

[155] *Standard Shade Roller Div., supra* note 150, at 90 (refusal to work overtime).

[156] *Western Lithograph Co.*, 71-1 ¶8276, 3965 (Shearer, 1970).

[157] *Nipak, Inc.*, 76-2 ARB ¶8434 (Ruiz, 1976). See also *A & M Metal Casket Co.*, 70-2 ARB ¶8871 (Altrock, 1970) (improper attitude, loafing); *Safeway Stores, Inc.*, 64 LA 563 (Gould, 1974) (rudeness to customers); *Grain Processing Corp.*, 75 LA 1254 (Stix, 1980) (refusal to pick up gum from floor). The grievant was likewise warned one day and improperly discharged the next in *Standard Shade Roller Div., supra* note 150. But in *Women's Gen'l Hosp.*, 74 LA 281, 290 (Klein, 1980), the grievant's discharge was sustained, despite the fact that she had been notified only a few days before that she was being suspended for three days for failing to work as scheduled, because in that short interval she "seriously compounded her record of misconduct by acts of insolence, belligerence, gross insubordination and by failing to perform critical work assignments on two consecutive days."

4. Suggestion of "Building a Record"

The issuance of too many warnings in too short a time has been interpreted as evidence that the employer was out to build a case against the grievant. Where, for example, the employer discharged a driver-salesman after it had given him three warnings in three days for minor infractions, the arbitrator drew the conclusion that "the reasons for discharge were pretextual, designed as a subterfuge for some other undisclosed reason."[158] In another case, the evidence convinced the arbitrator that "on those occasions where [the grievant] could not complete all of his work there were specific circumstances not within his control which prevented him from doing so and . . . the Company representatives made careful note of these instances in order to buttress a discharge for an entirely different and unwarranted reason."[159]

Record-building of a different sort was condemned by the arbitrator in another case. Upon discovering that an employee had falsified his employment application by denying that he had ever been convicted of a felony, the employer did nothing right away. Instead, it waited some nine months before discharging him. Though the falsification was material and the conviction would have influenced the hiring decision, the arbitrator nevertheless reinstated the employee, though without back pay. He inferred that the employer waited to see how the employee would work out and only then made the decision to discharge him. This, he concluded, was improper.[160]

5. Discipline Not Imposed Promptly

The corrective purpose of progressive discipline is likely to be frustrated if the employer delays for an unreasonable length of time before imposing a penalty.

Arbitrator Lipson: [C]ommon sense requires a reasonably speedy connection between an offense and the discipline imposed there-

[158]*Licek Potato Chip Co., supra* note 151, at 3356.

[159]*Food Giant Markets, Inc.*, 70-2 ARB ¶8477, 4574 (Helbling, 1970) (improper job attitude).

[160]*V. A. Medical Center*, 91 LA 588 (Howell, 1988). Other cases holding that the employer must act reasonably promptly after discovering false statements on an employment application include *Tiffany Metal Prods.*, 56 LA 135 (Roberts, 1971); *Price Bros. Co.*, 62 LA 389 (High, 1974); *Huntington Alloys, Inc.*, 74 LA 176 (Katz, 1980); *Wine Cellar*, 81 LA 158 (Ray, 1983).

after. Otherwise, the memory of the offender and those around him will become dim with regard to the event, and the punishment will inevitably become less logical with the passage of time.[161]

Furthermore, additional misconduct committed by an employee while the employer is waiting to impose discipline may be "thrown out of court," so to speak, if the penalty is later protested in arbitration. The employer's case went up in smoke, for example, when it waited to suspend the grievant for smoking marijuana on his lunch break until several months after an undercover agent first discovered what he was up to. "When an employee embarks on a course of conduct that is potentially harmful to his employer, he is entitled to be advised at an early opportunity that his actions are improper and must stop." The employer was not entitled to discipline the grievant for "repeated instances" of smoking marijuana when the employer had known of his activities but elected to give him enough rope to hang himself.[162]

[161]*Inland Tool & Mfg. Co.*, 65 LA 1203, 1207 (1975) (sale of marijuana). *Federal Aviation Admin.*, 87 LA 697, 700 (D'Spain, 1986): "Discipline cannot be postponed for the benefit of the employer . . . . To delay such action for seven (7) months is contrary to recognized labor standards. Discipline should be corrective in nature rather than punitive." In *Astro-Valcour*, 93 LA 91 (Rocha, Jr., 1989), the arbitrator cited a two-day delay in imposing discharge as evidence that the employer did not view the grievant's insubordination as "gross" insubordination. And in *Bureau of Alcohol, Tobacco & Firearms*, 93 LA 393, 89-2 ARB ¶8511 (Kravit, 1989), the arbitrator ruled that the employer should have promptly applied progressive discipline to an employee who submitted an inaccurate report and false travel voucher, not wait 21 months and then discharge him. The delay was unfair to the employee, said the arbitrator, and showed that the efficiency of the agency was not adversely affected by keeping the employee on the job. See also *Weatherhead Co.*, 56 LA 159 (Maxwell, 1971) (absenteeism); *Frontier Airlines, Inc.*, 61 LA 304 (Kahn, 1973) (excessive coffee breaks). In *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler, 1988) (poor performance), on the other hand, the arbitrator found the employer's delay in discharging the grievant not fatal, where it was occasioned by the employer's considerable efforts to rehabilitate the grievant. In *Zenith Elecs. Corp.*, 88-1 ARB ¶8229 (Patterson, 1987), the arbitrator ruled that a seven-month delay in discharging an employee for possession and sale of drugs on company premises did not invalidate the discharge, where the delay was caused by the employer's cooperation with a police investigation and the union was not prejudiced in its ability to defend the employee. *Union Tribune Pub. Co.*, 89-2 ARB ¶8542 (McBrearty, 1989), is to the same effect, except that the employer in that case was seeking to protect the confidentiality of its own investigation. See also *City of St. Paul*, 92 LA 641 (Scoville, 1989) (two-year delay in imposing penalty for accepting gifts from contractor not improper, where delay caused by city's desire to maintain secrecy of investigation of alleged corrupt practices in planning agency).

[162]*Air Force Logistics Command, McClellan Air Force Base*, unpublished opinion (Koven, 1984). To similar effect, see *Lawrence Gen'l Hosp.*, 55 LA 987, 990 (Zack, 1970), where the arbitrator noted that the absence of a warning or other discipline prior to the grievant's discharge "contributed to the build up of the record against her without giving her an opportunity to correct her conduct prior to the imposition of the demotion

6. Increase in Penalty

If management wishes to reserve judgment on the penalty to be imposed on an employee, it should be careful to make clear that whatever action it takes initially is not necessarily final. To impose a relatively light penalty and later to increase it in the absence of additional facts has been held to be a form of double jeopardy.[163]

EXAMPLE: An auto mechanic who got into a fight with a co-worker was given a two-day suspension by his supervisor. The other combatant, given five days off, asked in the mechanic's presence, "Well, is that going to be it? Am I going to get fired?" The supervisor replied, "No, that's it." The next day higher management, having given the matter further thought, decided both employees had to go.

The arbitrator held that the mechanic's discharge was not for just cause for two reasons. Given the circumstances of the fight, he said, the mechanic did not deserve discharge. But beyond that, the fact that he was initially given an unconditional two-day suspension precluded the employer from discharging him later for the same misconduct. The company's rules, the arbitrator noted, permitted but did not require discharge for fighting.[164]

7. "Out of Bounds" Penalty

In addition to being commensurate with the offense, penalties imposed for misconduct should be designed to encourage the employee to mend his or her ways. Penalties that might have other effects—for example, to humiliate the offending employee—have been held by arbitrators to be outside the compass of progressive discipline.

EXAMPLE: When a shop steward showed up for work wearing tennis shoes, which the rules stated could not be worn anywhere

penalty." See also *Allstates Air Cargo, Inc.*, 61 LA 640 (Sands, 1973) (excessive coffee breaks).

[163]*Misco Precision Castings*, 40 LA 87 (Dworkin, 1962) (card playing on break time). See also *Durham Hosiery Mills*, 24 LA 356 (Livengood, 1955) (fighting); *Georgia Power Co.*, 76 LA 761 (Foster, 1981) (threat, disruptive behavior); *City of Orlando*, 88 LA 572 (Frost, 1986) (substandard performance); *Marin Honda*, 91 LA 185 (Kanowitz, 1988) (fighting); *Transit Management of Southeast La.*, 95 LA 74 (Allen, 1990) (dishonesty).

[164]*Marin Honda, supra* note 163. See also *Ralston Purina Co.*, 88-1 ARB ¶8039 (Roumell, 1987) (grievant's act, initially treated as unauthorized absence, could not later be treated as insubordination).

within the plant, the guard refused to let him through the gate. The steward protested that he had safety shoes in his locker and had every intention of putting them on before he actually got to his work area. The guard called his chief, who agreed to admit the employee to the plant to get his shoes, but only if he was escorted to his locker by his foreman. The steward complied, but thereafter filed a grievance protesting that the tennis shoes rule was unreasonably applied in his case and that the "penalty" was improper.

The arbitrator found the tennis-shoes rule clear on its face, and the steward would have violated it had he worn tennis shoes anywhere on plant premises. But the penalty was another matter. The employer could have penalized the steward for showing up for work in the wrong shoes; but it was "at variance with the prevailing norms of imposing discipline" to subject him to the embarrassment of having other employees see him enter the plant with a supervisorial escort as a form of punishment.[165]

The case mentioned previously in which an employer tried to control excessive absenteeism by posting the attendance records of employees who missed more than their share of work offers another example of a penalty that falls outside the range available to the employer.[166] The theme of this case, as well as of the tennis shoes case, is that the corrective effect of the penalty chosen by the employer was overshadowed by its punitive character, and for that reason the purposes of progressive discipline would not be served.[167]

III. The Remedy

The Arbitrator's Options

"Penalty" and "remedy" might be regarded as first cousins. "Penalty" is what is applied as a punishment in the first instance

[165]*Allegheny Ludlum Steel Corp.*, 66 LA 1306, 1309 (Yagoda, 1976).

[166]*Electra-Gas Appliance Corp.*, 64 LA 1185 (Rinaldo, 1975).

[167]In *Hercules, Inc.*, 78-2 ARB ¶8535, 5489 (Owen, 1978), where the company required the grievant to perform cleanup work without pay as a penalty for being remiss in not making sure the cleanup was performed after his shift, the arbitrator found that "withholding the employee's wages for work performed as a means of discipline was contrary to accepted industry practice and was possibly a violation of the federal wage laws." See also *Dillingham Mfg. Co.*, 91 LA 816 (Nicholas, 1988) (improper to withhold holiday pay because of failure to work pre-holiday overtime, where employee met contractual holiday-pay-eligibility requirements).

2nd Ed.

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