Discipline & Due Process

Tri –State 2011
Iowa-Arkansas-Missouri
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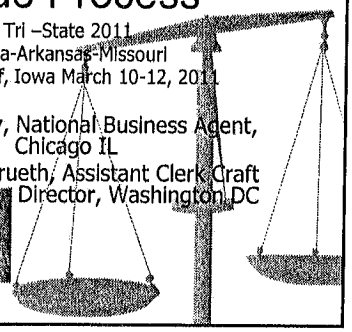
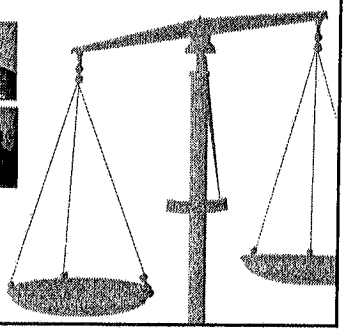


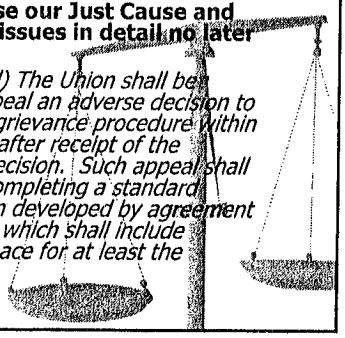
Thanks to: Rob Strunk, Pat Williams, Lamont Brooks, Bob Kessler, Dennis Taff, Merlie Bell and Jeff Kehlert

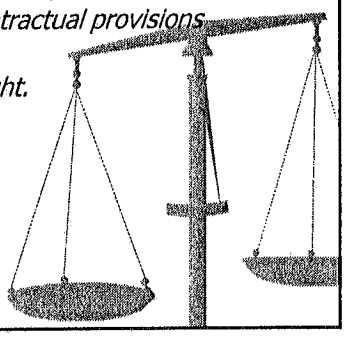
Grievance-Arbitration Procedure Article 15

We must raise our Just Cause and due process issues in detail no later than step 2

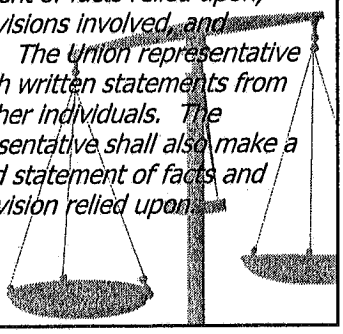
15.2.Step 1 (d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:



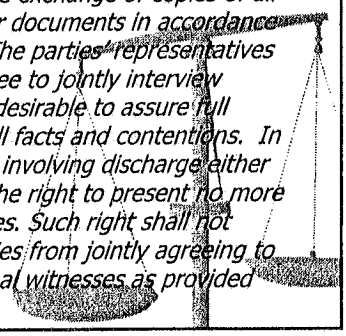
- *1. Detailed statement of facts;*
- *2. Contentions of the grievant;*
- *3.Particular contractual provisions involved; and*
- *4 Remedy sought.*



- Step 2 (d) *At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provision relied upon.*

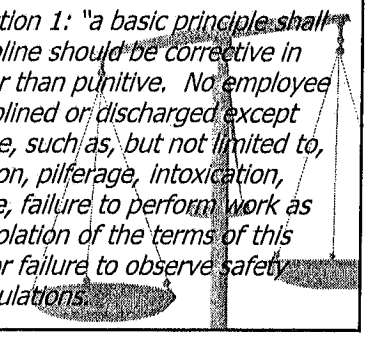


The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.



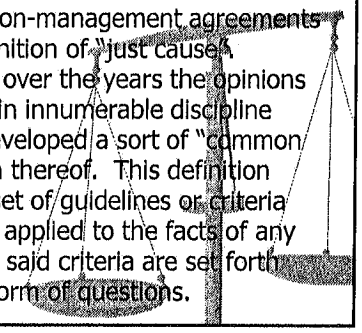
What does the Contract say about JUST CAUSE?

Article 16, Section 1: "a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause, such as, but not limited to, insubordination, pilferage, intoxication, incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations."

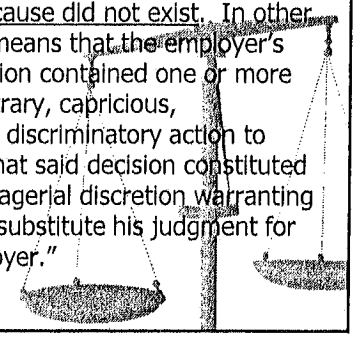


Benchmark decision Arbitrator Carroll R. Daugherty, 1964

"Few, if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

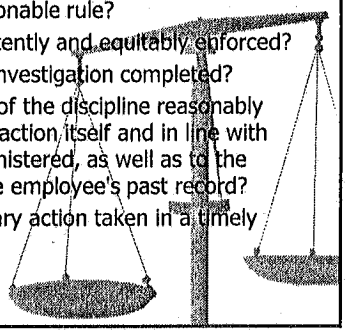


A no answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such no means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer."



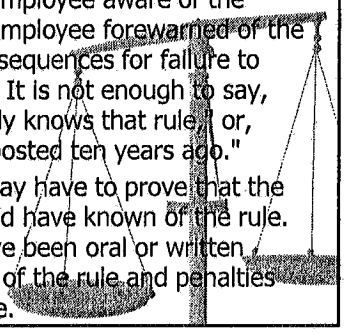
EL-921 Handbook Supervisor's Guide to Handling Grievances

- Is there a rule?
- Is the rule a reasonable rule?
- Is the rule consistently and equitably enforced?
- Was a thorough investigation completed?
- Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?
- Was the disciplinary action taken in a timely manner?



JUST CAUSE DEFINED
1. Is There a Rule?

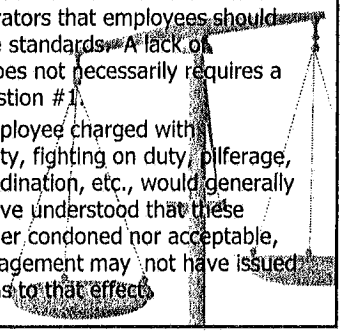
- If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or, "The rule was posted ten years ago."
- Management may have to prove that the employee should have known of the rule. There must have been oral or written communication of the rule and penalties to the employee.



Is There a Rule?

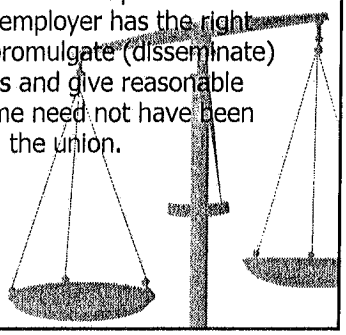
- Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. A lack of communication does not necessarily requires a no answer to question #1.

For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., would generally be assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.



Is There a Rule?

If there is not a contractual prohibition or restriction, the employer has the right unilaterally to promulgate (disseminate) reasonable rules and give reasonable orders; and same need not have been negotiated with the union.



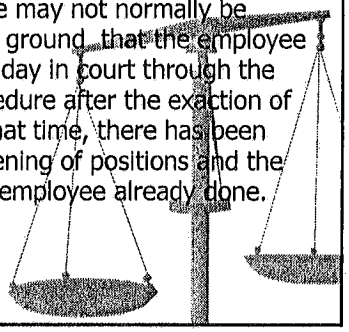
2. Was the rule reasonably related to (a) the orderly, efficient, and safe operation of the business and (b) the performance that the employer might expect of the employee?

- If an employee believes the rule is unreasonable, s/he must obey and file the grievance later, unless s/he feels that the rule or order would jeopardize personal safety or integrity.

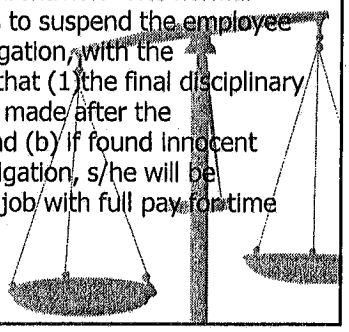
3. Did the employer, before administering discipline, make an effort to discover whether the employee did in fact violate a rule or order?

- This is the employee's "Day In Court" principle, also called a PDI. An employee has the right to know with reasonable precision the offense with which s/he is being charged and to defend his/her behavior.

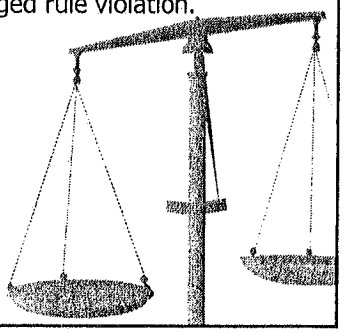
- The employer's investigation must normally be made BEFORE a decision to discipline is made. If the employer fails to do so, its failure may not normally be excused on the ground that the employee will get his/her day in court through the grievance procedure after the exaction of discipline. By that time, there has been too much hardening of positions and the damage to the employee already done.



- There may be circumstances under which management must react immediately to the employee's behavior. The normal proper action is to suspend the employee pending investigation, with the understanding that (1) the final disciplinary decision will be made after the investigation and (b) if found innocent after the investigation, s/he will be restored to the job with full pay for time lost.

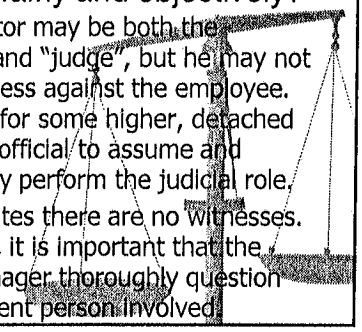


- Management's investigation should include an inquiry into possible justification for the employee's alleged rule violation.



4. Was management's investigation conducted fairly and objectively?

- The investigator may be both the "prosecutor" and "judge", but he may not also be a witness against the employee. It is essential for some higher, detached management official to assume and conscientiously perform the judicial role.
- In some disputes there are no witnesses. In such cases, it is important that the detached manager thoroughly question the management person involved.

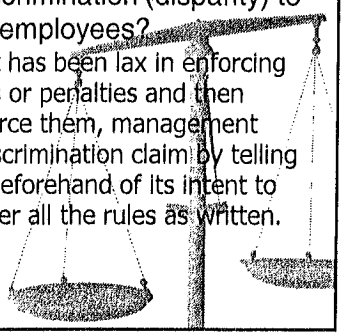


5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

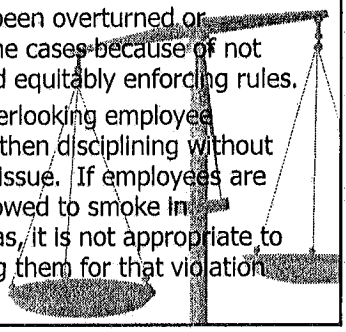
- It is not required that the evidence be conclusive or "beyond all reasonable doubt". But the evidence must be substantial....not flimsy.
- The management "judge" should actively search out witnesses and evidence not just passively agree with participants.

6. Has management applied its rules, orders and penalties even-handedly and without discrimination (disparity) to all employees?

- If management has been lax in enforcing its rules, orders or penalties and then decides to enforce them, management may avoid a discrimination claim by telling all employees beforehand of its intent to enforce hereafter all the rules as written.



- The USPS has been overturned or reversed in some cases because of not consistently and equitably enforcing rules.
- Consistently overlooking employee infractions and then disciplining without warning is one issue. If employees are consistently allowed to smoke in designated areas, it is not appropriate to start disciplining them for that violation.



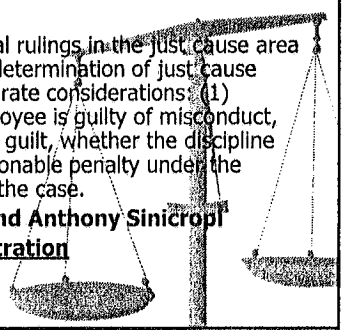
7. Was the degree of discipline reasonably related to the seriousness of the employee's proven offense and/or the record of the employee in his service to the USPS?

- A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses several times in the past.
- Record of previous offenses may never be used to discover whether s/he was guilty of the latest offense.

What does "just cause" mean?

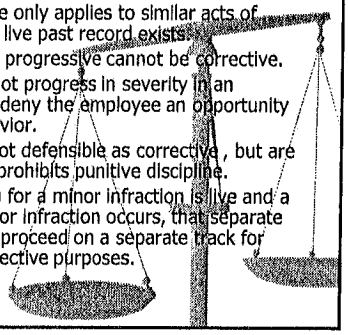
"A reading of arbitral rulings in the just cause area reveals that any determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case.

Marvin Hill, Jr., and Anthony Sinicropi
Remedies in Arbitration



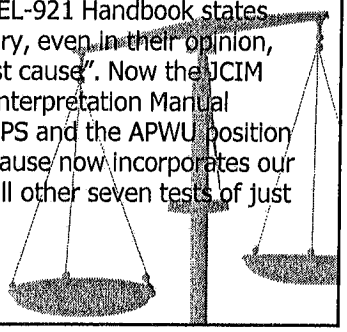
Progressive vs. Corrective Is there a difference?

- Progressive discipline only applies to similar acts of misconduct where a live past record exists.
- Discipline that is not progressive cannot be corrective.
- Penalties which do not progress in severity in an established pattern, deny the employee an opportunity to correct their behavior.
- Such penalties are not defensible as corrective, but are punitive. Article 16 prohibits punitive discipline.
- If a letter of warning for a minor infraction is live and a different type of minor infraction occurs, that separate type infraction must proceed on a separate track for progressive and corrective purposes.

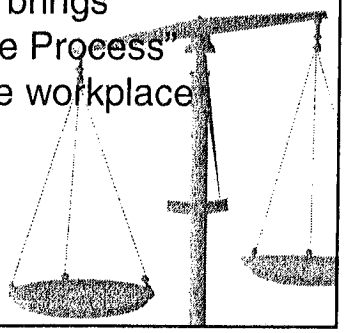


What does the USPS say "just cause means?

The USPS' own EL-921 Handbook states what is necessary, even in their opinion, to establish "just cause". Now the JCIM Joint Contract Interpretation Manual provides the USPS and the APWU position regarding just cause now incorporates our language with all other seven tests of just cause.
See JCIM pages 121-127



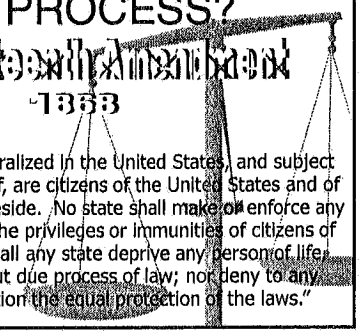
"Just Cause" brings "Due Process" to the workplace



What is DUE PROCESS?

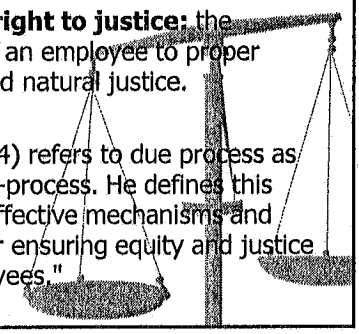
The Fourteenth Amendment
1868

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



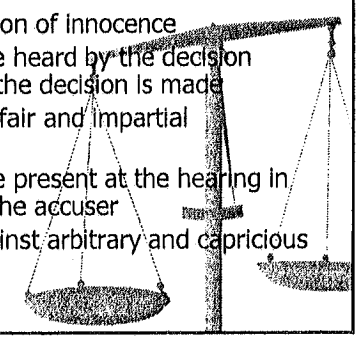
Due Process Defined

- **Employee's right to justice:** the entitlement of an employee to proper procedures and natural justice.
- Ewing (1989, 4) refers to due process as corporate due-process. He defines this term as " ... effective mechanisms and procedures for ensuring equity and justice among employees."



FUNDAMENTAL FAIRNESS

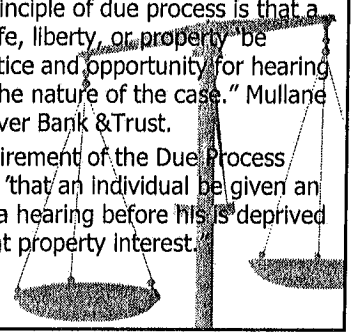
- The presumption of innocence
- The right to be heard by the decision maker before the decision is made
- The right to a fair and impartial investigation
- The right to be present at the hearing in order to face the accuser
- Protection against arbitrary and capricious behavior



The Supreme Court

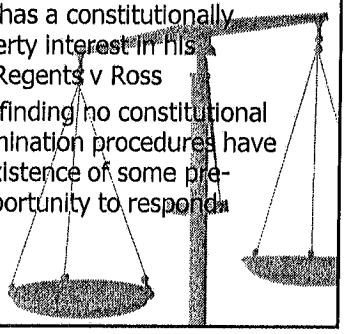
Cleveland Board of Education vs. Loudermill

- "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank &Trust.
- "...the root requirement of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'"



Cleveland Board of Education vs. Loudermill

- This principle requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Regents v Ross
- Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pre-termination opportunity to respond.

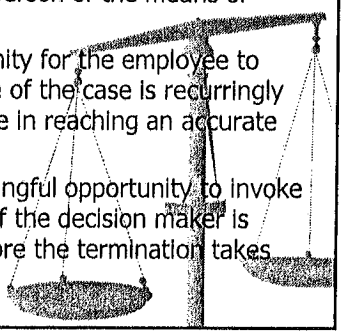


Cleveland Board of Education vs. Loudermill

"We have frequently recognized the severity of depriving a person of the means of livelihood."

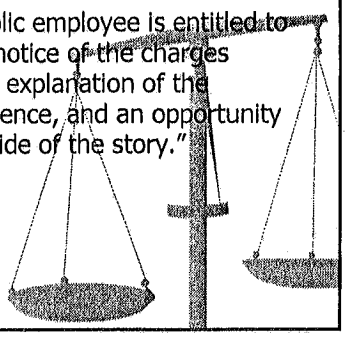
"...some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."

"...the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.



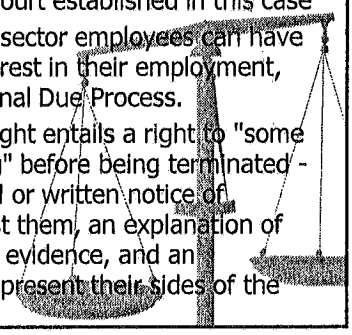
Cleveland Board of Education vs. Loudermill

"The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

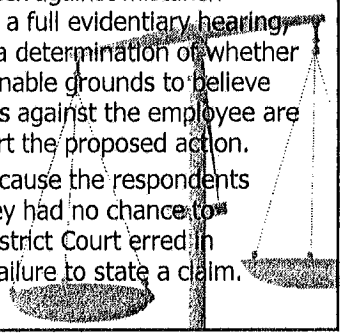


Cleveland Board of Education vs. Loudermill

- The supreme court established in this case
- certain public-sector employees can have a property interest in their employment, per Constitutional Due Process.
- this property right entails a right to "some kind of hearing" before being terminated -- a right to oral or written notice of charges against them, an explanation of the employer's evidence, and an opportunity to present their sides of the story.

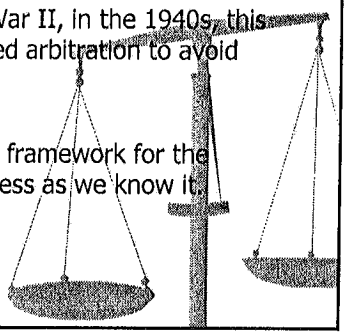


- thus, the pre-termination hearing should be an initial check against mistaken decisions -- not a full evidentiary hearing, but essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.
- In this case, because the respondents alleged that they had no chance to respond, the District Court erred in dismissing for failure to state a claim.



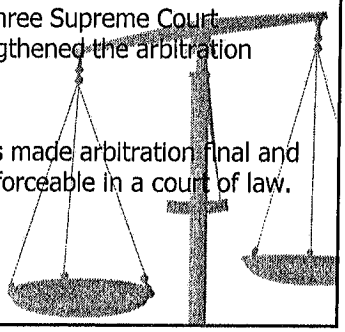
WAR LABOR BOARD

- During World War II, in the 1940s, this board authorized arbitration to avoid strikes.
- It would be the framework for the arbitration process as we know it.



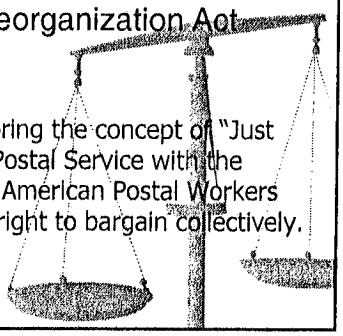
Steelworkers Trilogy 1960

- This series of three Supreme Court decisions strengthened the arbitration process.
- These decisions made arbitration final and binding and enforceable in a court of law.



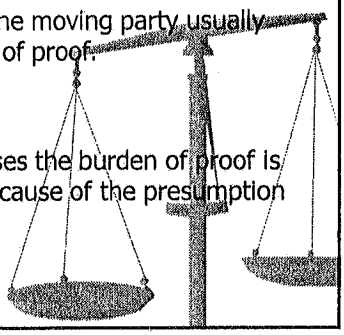
1971 The Great Postal Strike and the Postal Reorganization Act

These events bring the concept of "Just Cause" to the Postal Service with the creation of the American Postal Workers Union and the right to bargain collectively.



The Burden of Proof

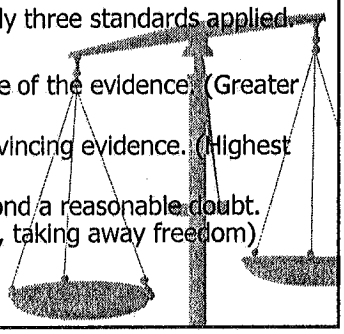
- In arbitration, the moving party usually has the burden of proof.
- In discipline cases the burden of proof is on the USPS because of the presumption of innocence.



The Quantum of Proof

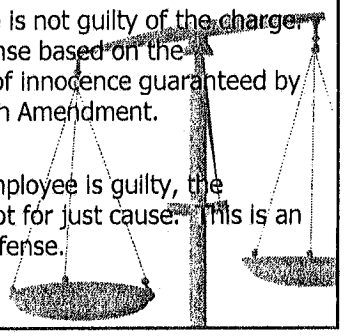
There are normally three standards applied.

- Preponderance of the evidence. (Greater than 50%)
- Clear and convincing evidence. (Highest civil proof)
- Evidence beyond a reasonable doubt. (Criminal only, taking away freedom)



Two Types of Defenses

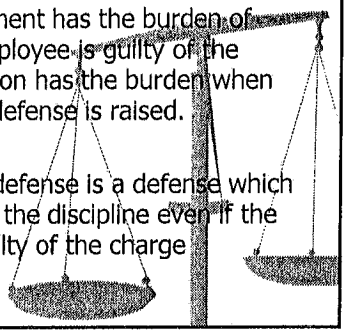
- The employee is not guilty of the charge. This is a defense based on the presumption of innocence guaranteed by the Fourteenth Amendment.
- Even if the employee is guilty, the discipline is not for just cause. This is an affirmative defense.



Affirmative Defense

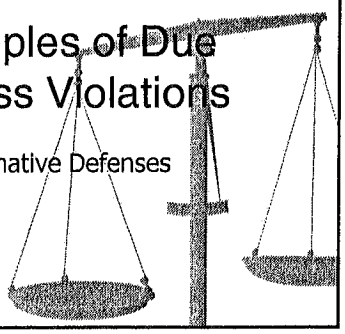
While management has the burden of proving the employee is guilty of the charge, the Union has the burden when an affirmative defense is raised.

An affirmative defense is a defense which would overturn the discipline even if the employee is guilty of the charge

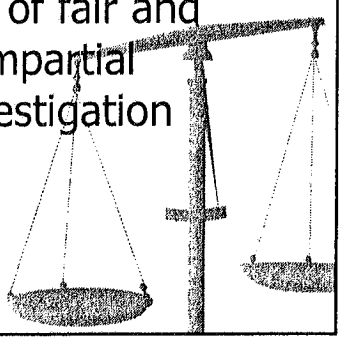


Examples of Due Process Violations

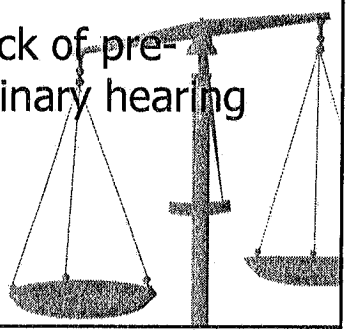
Affirmative Defenses



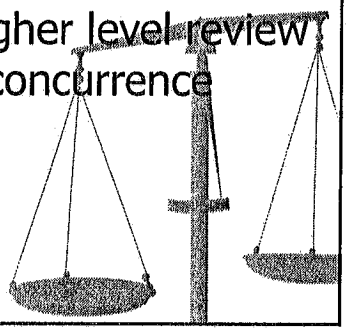
Lack of fair and impartial investigation



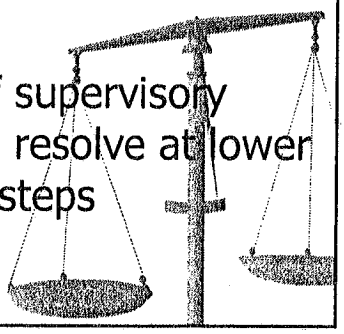
Lack of pre-disciplinary hearing



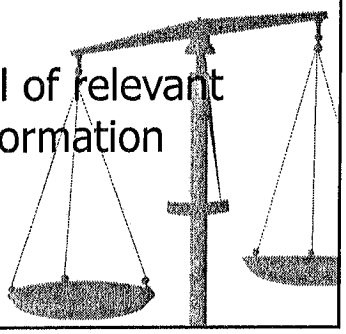
Lack of higher level review and concurrence



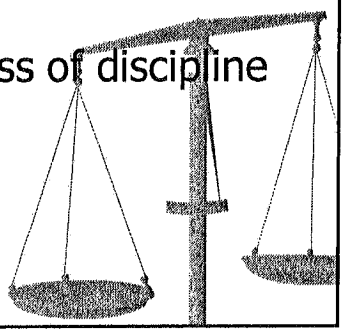
Lack of supervisory authority to resolve at lower steps



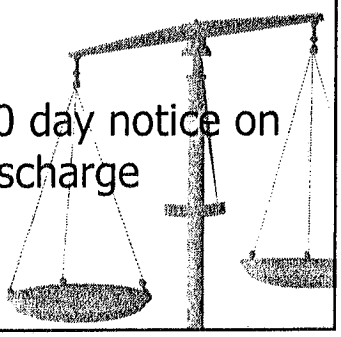
Denial of relevant information



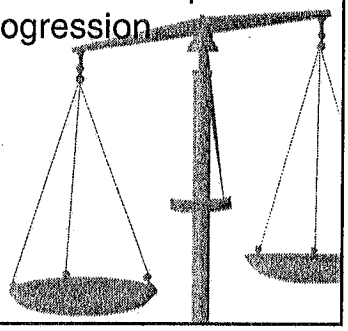
Timeliness of discipline



Lack of 30 day notice on discharge



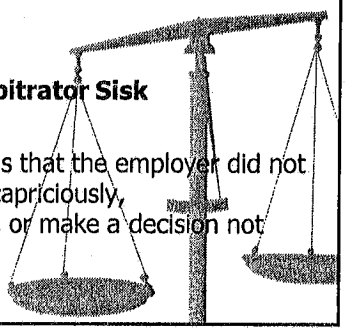
Past Discipline Relied upon for Progression



What have postal arbitrators said about "just cause".

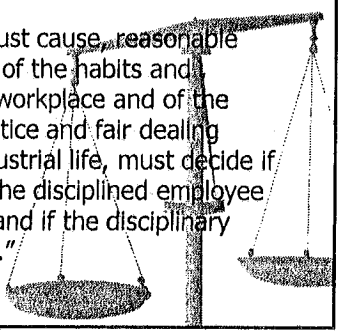
Arbitrator Sisk

"Just cause means that the employer did not act arbitrarily, capriciously, discriminatorily, or make a decision not based on fact."



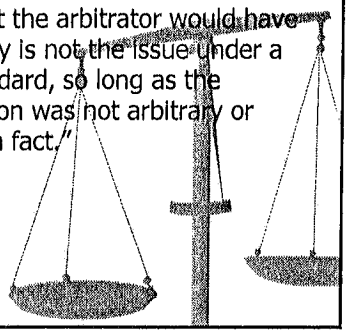
Arbitrator Platt

"To determine just cause, reasonable people, mindful of the habits and customs of the workplace and of the standards of justice and fair dealing prevalent in industrial life, must decide if the conduct of the disciplined employee was defensible and if the disciplinary penalty was fair."



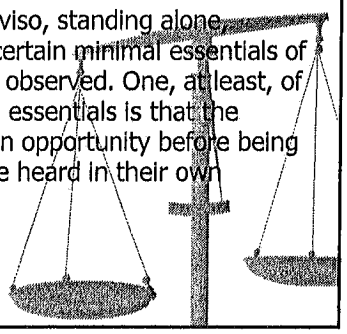
Arbitrator Morton

"Whether or not the arbitrator would have acted differently is not the issue under a just cause standard, so long as the employer's action was not arbitrary or without basis in fact."



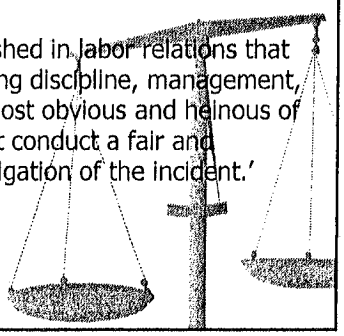
Arbitrator Nelson

"A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One, at least, of those minimum essentials is that the accused have an opportunity before being disciplined to be heard in their own defense."



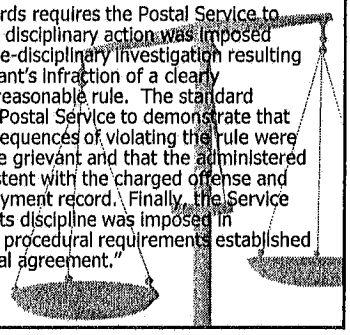
Arbitrator Mikrut

"It is well established in labor relations that prior to assessing discipline, management, except in the most obvious and heinous of situations, must conduct a fair and impartial investigation of the incident.'



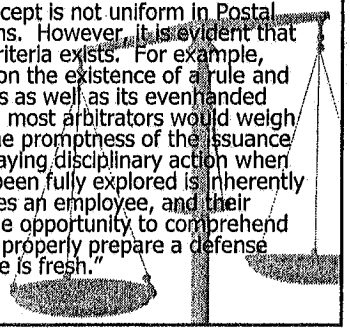
Arbitrator Shea

"The just cause standards requires the Postal Service to demonstrate that its disciplinary action was imposed after an objective pre-disciplinary investigation resulting in proof of the grievant's infraction of a clearly communicated and reasonable rule. The standard further requires the Postal Service to demonstrate that the disciplinary consequences of violating the rule were communicated to the grievant and that the administered discipline was consistent with the charged offense and the grievant's employment record. Finally, the Service must establish that its discipline was imposed in accordance with the procedural requirements established in the parties national agreement."



Arbitrator Mc Callister

"The just cause concept is not uniform in Postal Service arbitrations. However, it is evident that a core group of criteria exists. For example, arbitrators question the existence of a rule and its reasonableness as well as its evenhanded application. Also, most arbitrators would weigh the question of the promptness of the issuance of discipline. Delaying disciplinary action when the events have been fully explored is inherently unfair and deprives an employee, and their representative, the opportunity to comprehend the issues and to properly prepare a defense while the evidence is fresh."



Thank you

Without YOU there is no Union.

Success is never final and failure is never fatal...It is courage that counts.—UCLA Coach John Wooden