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**ANALYSIS OF INVESTIGATION, EVIDENCE,  
COMMUNICATION AND IMPLEMENTATION:**

**DUE PROCESS RIGHTS IN INVESTIGATIONS**

**by**

**Richard L. Kaspari  
Kathryn M. Engdahl**

**METCALF, KASPARI, HOWARD,  
ENGDAHL & LAZARUS, P.A.**

333 Parkdale Plaza  
1660 South Highway 100  
Minneapolis, MN 55416-1573  
952-591-9444

**TABLE OF CONTENTS**

INTRODUCTION.....	1
I.....NOTICE OF THE CHARGES	2
II.....MEANINGFUL OPPORTUNITY TO RESPOND	4
III.....FAIR INVESTIGATION	5
IV.....TIMELY EMPLOYER ACTION	7
CONCLUSION .....	8

## INTRODUCTION

Long before the enactment of laws prohibiting workplace discrimination and harassment, the principles of due process were established for employees represented by unions. Today, many employers fearing liability for discrimination and harassment are eager to prove that they have met their obligation to take “timely and effective action” in response to such accusations. It is important that they not overlook the corollary obligation: to uphold the rights of the accused. As these rights have been recognized and enforced in union workplaces through labor arbitrations, their observation bears benefits in non-union settings as well. This paper will explore the contours of important due process principles and discuss the benefits of incorporating them into investigations in any workplace.

The rights of the accused derive from the Constitution and developed principles of “industrial due process.” Public employees have a Constitutional right<sup>1</sup> to due process, which includes the right to specific notice of the charges against them, an explanation of the employers’ evidence, and an opportunity to respond to the charges before being deprived of a property interest in their employment. *Cleveland Board of Education v.*

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<sup>1</sup>The Fifth Amendment and Fourteenth Amendment of the United States Constitution apply to the United States and to state, local and municipal governments respectively. They provide that no person shall be deprived of life, liberty or property without due process of law. Public employees have a property or liberty interest in continued employment. *Arnett v. Kennedy*, 94 S.Ct. 1633 (1976).

*Loudermill*, 105 S.Ct. 1487, 1491 (1985). See *Elkouri & Elkouri, How Arbitration Works* (BNA, 6<sup>th</sup> ed. 2003), pp. 1255-1269. Private sector employees who are unionized have inherent due process rights requiring fairness in investigation and discipline. Labor arbitrators have recognized at least five elements of this industrial due process: (1) notice to the accused of the specific accusations; (2) an opportunity for the accused to respond to the accusations before determination of discipline; (3) a fair investigation; (4) timely employer action; and (5) no double jeopardy. See *Discipline and Discharge in Arbitration*, ABA Labor and Employment Law Section (BNA, 1998), p. 37; *Elkouri & Elkouri, How Arbitration Works* (BNA, 6<sup>th</sup> ed. 2003), pp. 967-969.

Although required in union and public sector workplaces, adherence to due process is a good practice in all settings. Due process enhances the integrity of the investigation and the ultimate determination. Due process increases the likelihood that the investigation and determination will not be challenged or, if challenged, will be upheld. The fundamental principle of due process – fairness for all concerned – allows a level of respect to prevail as employers and employees move through these most challenging circumstances.

The purpose of this paper is to consider how the four major principles of industrial due process come into play in workplace investigations and to suggest that adherence to due process enhances investigations in all workplaces.

## **I. NOTICE OF THE CHARGES**

Industrial due process accords union employees the right to be informed of the specific charges against them before the employer determines disciplinary action. This

notice should describe the type, scope and nature of the charges, and include facts sufficient to support the reasons discipline would be appropriate. See *Discipline and Discharge in Arbitration* (BNA, 1998), pp. 43-45; *Discipline and Discharge in Arbitration, 2001 Supplement* (BNA, 2001), p. 6. Even where an employee has been notified of the accusations, if new accusations emerge in the course of the investigation, due process may require notice of the new charges. One arbitrator revoked the imposed discipline, because the employer failed to inform the disciplined employee of complaints garnered after he had been interviewed. *Minneapolis Special School Dist. No. 1*, 123 LA 545, 549 (Jacobowski, 2007).

Another aspect of this due process element is prior notice that the infraction could lead to the discipline imposed. An arbitrator found that an employer's harassment policy failed to provide adequate notice that an employee could be terminated for mere possession of offensive materials stored in a file in the employee's desk. *Xcel Energy Co.*, 123 LA 596, 603 (Daly, 2007). Arbitrator Daly concluded:

The Company's Code of Conduct and the Company's training must provide fair notice that the Company will and can terminate employees for possession on the premises or in company property such as Company vehicles of even uncommunicated sexually and racially offensive materials.

*Id.* The employee who had been terminated for keeping a "joke file" over many years was ordered reinstated solely because the notice was too vague. See also *California Sportservice*, 123 LA 1228, 1234 (Calhoun, 2007) (employer must "give employees forewarning of the possible or probable disciplinary consequences of the employee's

conduct, except in egregious circumstances where societal norms can substitute for warning . . .”).

Clear communication to employees of rules of conduct and the consequences if they are violated is a basic precept of good practices in workplace management. Giving an accused employee specific notice of all charges which may lead to discipline serves the interests of a full and fair investigation.

## **II. MEANINGFUL OPPORTUNITY TO RESPOND**

Generally, arbitrators recognize the accused employee’s right to be heard before discipline is imposed, although some arbitrators require a showing that the grievant was prejudiced by denial of this opportunity. See *Discipline and Discharge in Arbitration* (BNA, 1998), pp. 45-47; *Discipline and Discharge in Arbitration, 2001 Supplement* (BNA, 2001), pp. 6-7; Koven and Smith, *Just Cause: The Seven Tests* (BNA, 3<sup>rd</sup> ed. 2006). Some arbitrators view the failure to interview the accused as a fatal flaw in the employer’s defense to its disciplinary decision. See, e.g., *Milbank Mfg. Co.*, 112 LA 464, 467 (Crider, 1999); *State of Montana*, 122 LA 923, 927 (Calhoun, 2006); *California Sportservice*, 123 LA 1228, 1235 (Calhoun, 2007). Arbitrator Crider explained the importance of upholding this principle:

“ . . . [J]ust cause . . . demands that certain minimum essentials of due process be observed. One . . . of those minimum essentials is that the accused has the opportunity before sentence is carried out to be heard in his own defense . . . [I]t is the process, not the result, which is at issue.”

*Boise Cascade Corp.*, 114 LA 1379, 1384 (Crider, 2000), citing *McCartney’s, Inc.*, 84

LA 799, 804 (Nelson, 1985). Another arbitrator found that, even where the accused employee did not offer an explanation for her conduct, the employer had an obligation to investigate and to take further action to elicit the accused employee's side of the story.

*Lincoln Lutheran of Racine, Wisc.*, 112 LA 72, 76-77 (Kessler, 1999).

A flawed process of denying an accused employee the right to be heard can create a flawed result. The employer who makes a disciplinary decision without hearing the accused employee's side of the story may be acting on assumptions and incomplete facts. To give audience to the accused only after discipline has been determined unfairly places the employee "in the unfortunate position of trying to change the employer's mind rather than explaining her side of the story before management's mind becomes entrenched in a conclusion – an often hopeless battle." *State of Montana*, 122 LA 923, 927 (Calhoun, 2006).

### III. FAIR INVESTIGATION

The due process standard for a "fair investigation" is that it be thorough and unbiased. See *Discipline and Discharge in Arbitration* (BNA, 1998), pp. 39-43; *Discipline and Discharge in Arbitration, 2001 Supplement* (BNA, 2001), pp. 5-6.

A thorough investigation includes interviews of the accuser, the accused and particularly those who witnessed the alleged misconduct. Many arbitrators are reluctant to uphold discipline imposed without the benefit of evidence that could be provided by first-hand witnesses. See, e.g., *Milbank Mfg. Co.*, 112 LA 464, 467-468 (Crider, 1999) (failure to interview any witnesses, including the grievant, formed basis for award of reinstatement with full back pay); *ESAB Welding & Cutting Products*, 115 LA 79, 83

(Wolkinson, 2000) (failure to interview all witnesses to alleged ethnic slur formed basis for reversal of termination); *Oak Forest Hospital*, 122 LA 763, 770-771 (Briggs, 2006) (employer's failure to interview key witnesses led to reversal of the grievant's suspension). A thorough investigation also includes retrieval of relevant documentary evidence. One arbitrator found a "grave procedural error" in the employer's failure to preserve and produce a video tape of a bus driver's conduct, where the employee promptly had requested the tape's retrieval. *Hamilton City School Dist.*, 122 LA 463, 470-471 (Dean, 2006) (ordering reinstatement solely because of the due process violation). Arbitrator Dean admonished, "Withholding exculpatory evidence prevents the accused from mounting an effective defense against unfounded accusations." *Id.*

A fair investigation must be free of bias and prejudgment. An investigation which amounts to little more than "going through the motions" to justify a foregone conclusion does not pass the due process requirement of impartiality. *See Discipline and Discharge in Arbitration* (BNA, 1998), p. 40; *California Sportservice*, 123 LA 1228, 1235 (Calhoun, 2007). A full and fair investigation contemplates that the employer will evaluate the evidence for content, consistency and credibility. *See Lockheed Martin*, 123 LA 244, 250-251 (Riker, 2006) (employer's failure to analyze the evidence to substantiate the conclusion that the grievant was becoming a threat resulted in order of reinstatement with back pay). Evidence of bias often can be found in the employer's approach to the investigation. An investigation was found to be impermissibly biased where the employer had asked witnesses questions that were leading or suggesting disapproval of the accused. *Minneapolis Special School Dist. No. 1*, 123 LA 545, 549

(Jacobowski, 2007); *Coca Cola USA*, 112 LA 193, 195 (Rezler, 1999). Bias was found where complaining witnesses were pressured into giving statements and were misled as to the purpose of the investigatory interviews. *Coca Cola USA*, 112 LA 193, 195 (Rezler, 1999).

Some arbitrators discern bias by scrutinizing how the employer administers its own rules and policies. One arbitrator found bias where the employer imposed discipline against the grievant without any corroborative witnesses, while the employer had dismissed the grievant's prior complaints due to lack of corroborative witnesses. *Coca Cola USA*, 112 LA 193, 195 (Rezler, 1999). Another arbitrator observed that a one-sided investigation, coupled with the employer's failure to intervene at the first indication of a perceived threat of the grievant's alleged violence, established a due process violation. *Lockheed Martin*, 123 LA 244, 252-253 (Riker, 2006) (awarding reinstatement with full back pay). Generally, where the investigation process suggests that the employer is marshaling the facts to support a predetermined result, it will be found to violate due process.

Employers and employees alike are well-served by a thorough and unbiased investigation. Moreover, employers' even-handed and proactive enforcement of workplace policies complies with the very laws those policies are promulgated to obey.

#### **IV. TIMELY EMPLOYER ACTION**

When an employer becomes aware of alleged misconduct, due process requires the employer to investigate and take action within a reasonable time. See *Discipline and Discharge in Arbitration* (BNA, 1998), pp.37-39; *Discipline and Discharge in*

*Arbitration, 2001 Supplement* (BNA, 2001), p. 5. Delay in notifying an employee of pending charges may impair the employee's opportunity to mount a defense, as memories fade and witnesses become unavailable. *Id.* Delay in imposing discipline, except where excused, may also be considered a due process violation. An employee who was discharged for sexual harassment was reinstated and his discipline reduced to one-week suspension where the proven misconduct either preceded the discharge by over a year or occurred at an undetermined time. *Mead Corp.*, 113 LA 1169, 1182-1184 (Franckiewicz, 2000). Arbitrator Franckiewicz observed:

Discipline based on stale offenses is disfavored for a number of reasons. As time passes, memories fade, witnesses depart, and records are discarded. The reliability of the evidence diminishes as the interval from the alleged misconduct increases. Likewise, it becomes more difficult for the accused employee to recall or reconstruct events and to marshal evidence in his own behalf as the underlying event becomes more remote in time. Finally, the gap between the occurrence and the discipline not only represents an additional investment of the employee's finite years of work life into the enterprise, but also counters any inference that the individual is an unacceptable employee, at least where (as here) no other discipline has been issued in the interim. For these reasons, the strength of the case for discharging an employee decreases as the length of time since the misconduct involved increases.

*Id.* at 1182-1183.

The due process requirement of prompt investigation and action thereon is entirely consistent with the employer's obligation to take timely action when it becomes aware of such workplace misconduct as illegal harassment and discrimination.

### **CONCLUSION**

Respecting employees' due process rights serves the interests of more than the accused employees. Investigatory practices incorporating the due process principles discussed in this article serve the interests of employers and employees alike – by ensuring timely, thorough and unbiased investigations. Fairness of the process will enhance the integrity, credibility and acceptance of the investigation as well as its results.