Just Cause - 7 Questions Worksheet
Grievance #:
Grievant:
Steward:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a no answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

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

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

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

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunken-ness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the perogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

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HISTORY, EXPLANATION and USE:

The above is from Arbitrator Carroll R. Daugherty in the Grief Brothers Cooperage Corp. decision in 1964 and in a later decision, Enterprise Wire Company.

Arbitrator Daugherty wrote the above as the company's collective bargaining agreement did not have a definition of Just Cause. The APWU's first contract was ratified in 1971. Since then we have Just Cause codified (incorporated into) into our Contract. But our contract does not define Just Cause. Our JCIM does include some language, but it is not all inclusive.

Just like Due Process rights which are inherent from the US Constitution (14th Amendment), our CBA does not explicitly outline every right we have. The difference between the JCIM and Just Cause above is mainly the notes by Arbitrator Daugherty.

For example, Number 1 Note 2, "There must have been actual oral or written communication of the rules and penalties to the employee. " The JCIM states, "Management may have to prove that the employee should have known of the rule." The argument is: Management has an obligation to verbally or in writing explain the rule prior to issuing discipline.

A second example is Number Five, Note 1, 2 and 3. The JCIM states "Was a Thorough Investigation Completed?" Number Five above goes into the perspective of an Arbitrator. Number 1 defines the common amount of evidence Management needs - different courts have different standards. Number 2 defines what a complete and thorough investigation is - Management must seek the truth through witnesses and evidence, not take a single story as fact. And Number 3 explicitly establishes that an Arbitrator does not decide on the evidence, but on the soundness of the decision.

As a Steward, Number 5 gives us the angles on how to use our Contract to fight discipline. If Management presents a narrative when issuing discipline, we can argue this Contractual Violation in one of two ways. One is that Management did not conduct a complete investigation and intentionally or unintentionally did not fact check or investigate differing opinions to the narrative they established. The second main way is to argue Management intentionally ignored or excluded information from the record.

In a Grievance I would argue method one by doing Managements job for them. Interview the Grievant, and ask if they have witnesses. Interview witnesses. Review copies of all Managements evidence for things they missed. Check badge swipes and clock rings to establish who was in the facility. Speak to those people or interview them. Etc. A complete investigation. Then argue at Step 1 and put into writing in Step 2 what you uncovered and how different it was. This creates a contractual violation. The Grievant does not need to be proven innocent, you simply need to create reasonable doubt and prove that Management did not investigate properly. Management has the responsibility to find who is guilty, we just prove Management does not know for sure the Grievant is guilty.

For method two is more complicated but can be far quicker. Using clever requests for information you establish what Management used to determine discipline should be issued. I commonly request, “Anything and everything Management used to determine discipline should be issued” OR “A Copy of Managements investigation” or whatever language you use locally. At this point you point out what information Management excluded in your personal notes and base arguments on these facts.

For attendance, documentation the Grievant submitted is often excluded. Using your first RFI you establish that Management did not use the information to make their decision. You then establish the documentation exists and can ask the Grievant for it or complete a second request for information for it specifically. Finally, using a request for the fax logs, interviewing the Supervisor documentation was submitted too, or a statement / interview of the Grievant can be used to establish Management had this information. You then argue Management willingly excluded the information to make the Grievant appear guilty.

You can use the above 7 Question Worksheet to breakdown every charge Management has against a Grievant. The most important fact to know is the JCIM is language that Management and the Union can agree upon after the CBA is approved. The 7 Tests Language that appears in the JCIM is mostly copy and paste from the EL 921. You can and should attack Management's ignorance and mistakes in the process.