LAW-RELATED NEWS AND VIEWS YOU MAY HAVE MISSED IN *THE WALL STREET JOURNAL*

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much less MAGA, and its constitutional cleanup is a tremendous accomplishment for the country."

"This term, 44% of the Court's decisions were unanimous, close to the two-decade average….In 24% of cases all three liberal Justices were in dissent…But 15% [of cases] had three or more conservatives on the losing side…including the tariff and birthright citizenship rulings….No, today's Court isn't partisan, and its restoration of venerable constitutional principles is a project worthy of America's 250th." ***WSJ*** **editorial, July 3, 2026, p. A14.**

The *WSJ*'s James Taranto quotes Justice Elena Kagan, one of the "liberal" justices: "Is this court…[a] puppet for the current administration? I think definitely not." Taranto questions the reliability of some criticism directed at the justices: "Much of today's commentary about the Supreme Court, from the right as well as the left, is partisan and legally shallow. Those of us who regard the court as an essential institution find it particularly distressing how personal it often gets." ***WSJ*** **opinion, August 8-9, 2026, p. A11.**

7. On Michigan democracy and the "political class."

Michiganders vote "on tax hikes and other critical local questions—all in off-cycle elections in which low turnout makes them likelier to pass." "It isn't uncommon for off-cycle elections to see a third, a quarter or even less than a fifth as many people to show up and vote" than on "the typical November Election Day." "For local politicos with big spending plans, this provides an opportunity to tilt the playing field."

It is "illegal to electioneer with public money" in Michigan, but officials "can use taxpayer money to grease the skids" by publishing "guides and materials that 'inform' voters about how tax-hike revenue will be spent. So long as they don't say 'vote yes,' they are fine."

The "combination of these 'educational materials' and low turnout can get the votes to pass such ballot measures." "The political class almost always wins." "Off-cycle elections heavily advantage politicians and special interest groups to the detriment of taxpayers."

"It is one thing for primaries to be held off-cycle, so a smaller number of voters can decide each party's candidate before the big day in November. It is another matter entirely for a relatively tiny slice of the electorate to foist tax hikes and spending decisions on everyone else." "The solution is simple: Move meaningful local ballot questions to Election Day in November." **Michael J. Reitz, opinion excerpts,** ***WSJ,*** **August 1-2, 2026, p. A11.** ■

DUE PROCESS AS AN ELEMENT OF JUST CAUSE IN LABOR ARBITRATION

Lee Hornberger
Arbitrator

This article reviews how arbitrators, treatises, and courts have reviewed employer use of due process before imposing discipline on an employee under a collective bargaining agreement (CBA). The consensus is that employers should provide notice, conduct a fair and thorough investigation, and allow employees a meaningful opportunity to respond before imposing discipline. The pertinent due process questions include: Was the employee given a meaningful opportunity to tell the employee's side of the story before discipline was imposed? Was there an adequate check against the possibility of an incorrect decision? Are the due process principles imbedded in the CBA?

1. St. Antoine, ***The Common Law of the Workplace*** **(2d ed. 2005)**

Concerning due process, St. Antoine, pp. 206 and 217-219, states:

> **§ 6.13 Notice of Charges and Hearing**
>
> **Just cause requires that an employee being disciplined or discharged be given notice of the charges against him or her and a meaningful opportunity to be heard. …**
>
> **§ 6.19 Remedies for Due Process Violations in General**
>
> **When a due process guarantee of the contract (either one that is an inherent part of just cause, or one arising out of a specific contract provision) has been violated in a significant way, most arbitrators conclude that the violation will affect the degree of the penalty or other adverse employer action, and some arbitrators conclude that the violation will nullify the penalty entirely.** [Emphasis in original]

2. Elkouri & Elkouri, ***How Arbitration Works*** **(8th ed. 2016)**

Elkouri & Elkouri, p. 15-49, states, "Industrial due process … requires management to conduct a reasonable inquiry or investigation before assessing punishment." The issue of due process and following correct procedures can impact on just cause and the amount of discipline, if any, that should be approved or imposed. *Id*. at 15-47 to 15-50. Arbitrators will, in many cases, refuse to uphold the employer's action where the employer failed to fulfill some procedural requirement specified by the CBA. *Id*.

Abrams, ***Inside Arbitration*** **(2013)**

Abrams, p. 211, states:

> … [T]he concept of "due process" is inherent in the just cause provision.
>
> … [a]arbitrators prefer seeing evidence that management … offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

3. Nolan, *Labor and Employment Arbitration* (1999)

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, pp. 205 to 206.

4. Federal Courts of Appeal

Federal courts have held that due process applies to "just cause" discharge cases. *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990), held that the arbitrator appropriately determined due process to be a component of good cause for discharge. *Federated Dep't Stores* said,

> In *Chauffeurs, Local Union No. 878 v. Coca-Cola Bottling Co*., 613 F.2d 716 (8th Cir.), cert. denied, 446 U.S. 988 … (1980), the Eighth Circuit … noted that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases." *Id*. at 719. In *Coca-Cola Bottling Co*., the arbitrator found that despite the employee's dishonesty, the lack of procedural fairness afforded to him by the company fell short of the just cause standard. … Coca-Cola Bottling Co. did not provide the employee an opportunity to tell his side of the story prior to termination. Drawing upon scholarly articles which studied arbitration awards, the court found that an arbitration award that interpreted just cause to include due process "drew its essence" from the agreement. *Id*. at 719-20. See also *Super Tire Eng'r Co. v. Teamsters Local Union No. 676*, 721 F.2d 121 (3rd Cir.1983) (enforcing an arbitrator's award where employee was reinstated because he was not given a warning before his discharge for drinking alcoholic beverages during working hours), cert. denied, 469 U.S. 817 … (1984). We agree with the Third Circuit that because it is not unusual for an arbitrator to apply due process notions to just cause, the arbitrator derived his decision from the essence of the collective bargaining agreement.

Chauffeurs, Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir.), cert. denied, 446 U.S. 988 (1980), said,

> arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. As Professor Summers noted, "[o]n the bare words `just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law." Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 Va. L. Rev. 481, 500 (1976) (footnote deleted). Professor Summers also commented that the retention of the bare "just cause" language in newly negotiated agreements is an indication of the widespread acceptance of arbitrators' due process interpretations. *Id.* at 505. To a similar effect are the comments of Professor Getman: To enhance its chances of winning at arbitration, a company needs to establish careful disciplinary procedures consistent with arbitration awards defining the concept of just cause. Arbitrators generally insist on equal punishment for the same offense, and they require that employees be given advance notice of company rules and a chance to explain their behavior before they are disciplined. Getman, *Labor Arbitration and Dispute Resolution,* 88 Yale L.J. 916, 921 (1979) … .

5. Michigan Court of Appeals

An employer's procedural violations can justify the arbitrator modifying discipline even when the underlying misconduct is proven. *Michigan Association of Police v. Pontiac*, 177 Mich. App. 752, 759-760 (1989), states:

> It is accepted that an arbitrator, if not specifically limited by the terms of the collective bargaining agreement, is free to fashion a remedy which considers the relative faults of the parties. See *Zeviar v. Local No 2747, Airline, Aerospace Allied Employees,* 733 F.2d 556 (CA 8, 1984) (employee reinstated but with only half of lost wages because she was also at fault), and *Air Line Pilots Ass'n, International v. Eastern Air Lines, Inc,* 632 F.2d 132 (CA 5, 1980) (reinstatement without full benefits upheld). In *Brotherhood of Railway, Airline Steamship Clerks v. Kansas City Terminal Railway Co,* 587 F.2d 903, 906-907 (CA 8, 1978), cert den 441 U.S. 907 … (1979), the court, quoting *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (CA 5, 1970), stated the test as "not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract." … .

6. Labor Arbitration Awards

Arbitrators have found that notice of charges, a fair investigation, and an opportunity to be heard are procedural due process protections inherent in the just cause standard.

Arbitrator Creo stated at *Washington Penn Plastics*, *Performance Products Division*, 2025 LA 19 (2025),

> … the issue of notice of charges, a fair investigation of the alleged infractions, and the opportunity to be heard as due process and procedural protections inherent in the just cause standard or as mandated by the collective bargaining agreement or law. …
>
> Although the investigation may have been accurate in its factual findings and conclusions, and the Employer otherwise making a sound determination that just cause existed for the conduct of Grievant, the procedural requirements of the Agreement still must be followed. The Arbitrator does not find that a violation of procedural rights is harmless error or otherwise constitutes a de minimis violation. A due process violation of this nature that de minimis violation an express clause of the negotiated collective bargaining agreement requires remedial action.

Arbitrator Goldstein indicated at *State of Illinois*, 136 LA 122, 129-130 (2015):

> [A]n employer's obligation to a predisciplinary investigation is determined by context. … [T]he level of discipline involved is an important consideration … in determining whether the underlying investigation by the employer was fair and reasonable.

United Parcel Service, 118 LA 1127, 1136 (Landau, 2003), sustained a grievance based on untimely notice where the CBA stated that the employer waived its right to discharge an employee if notice was not provided within 10 days.

Shaefer's Ambulance Serv., 104 LA 481, 486 (Calhoun, 1995), indicates,

> Procedural fairness requires an employer to conduct a full and fair investigation of the circumstances surrounding an employee's conduct and to provide an opportunity for him to offer denials, explanations, or justifications that are relevant before the employer makes its final decision, before its position becomes polarized.

Arbitrators have declined to set aside discipline when a grievant suffers no prejudice following an employer's non-compliance with procedural requirements. *Jackson Memorial Hospital*, 126 LA 723 (Abrams, 2009) (declining to set aside discipline despite the employer's failure to satisfy CBA deadlines because "there was no prejudice to the Grievant or the Union by the modest delay"); *Argosy Gaming Co.*, 110 LA 540 (Fowler, 1998) (declining to overturn discharge where there was no showing of prejudice to the union or to the grievant by the absence of timely notice).

Remedy

The arbitrator has the authority to grant an appropriate remedy when due process safeguards have been violated. Elkouri & Elkouri, pp. 18-1 to 18-14. Abrams, pp. 169 to 184.

St. Antoine states at pp. 218-220:

> **§ 6.20 Alternative Sanctions Against Employers for Due Process Violations**
>
> **(1) When a specific due process guarantee of the contract has been violated in a significant way, but the relevant law or the contract does not permit an otherwise appropriate make-whole remedy for the employee, an alternative sanction will be imposed on the employer.**
>
> **(2) When a specific due process guarantee of the contract has been violated, but the violation is insufficient to affect the substantive rights of the employee in a significant way, an alternative sanction may be imposed on the employer.**
>
> **Comment:**
>
> This section recognizes that positive contractual obligations are not to be ignored, even when their direct enforcement is blocked by a relevant law, or when a make-whole remedy is inappropriate because the due process violation was not sufficient to deny the employee substantial justice, or when there is a limitation on the arbitrator's powers. The theory is that when the parties provide for a positive obligation, rather than hortatory or aspirational language, they intend to have that obligation enforceable through sanctions. In some instances, the violation is de minimis and does not require an alternative employer sanction. [Emphasis in original]

A split decision such as reinstatement with less than full back pay or some "back pay" without reinstatement, "… is not a compromise, but a clear reflection of the competing interests of the parties in the context of the case." Abrams, p. 181.

When the parties agree to submit a matter to arbitration, they invest the arbitrator with discretion to resolve their dispute in a manner which is appropriate under the circumstances.

Conclusion

Arbitral authority, judicial precedent, and treatises discuss the principle that due process is part of the just cause standard. To meet the just cause standard, employers should provide notice, conduct a thorough investigation, and allow employees a meaningful opportunity to tell their side of the story before imposing discipline. Depending on the CBA language, when procedural safeguards are ignored, arbitrators can reduce or overturn the discipline. ■

ABA ETHICS OPINION 518 AND ITS EFFECT ON MEDIATORS, MEDIATION, AND MEDIATOR PROPOSALS

Paul F. Monicatti

I. Introduction

Last fall the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 518 **(**https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-518.pdf). While it was based on the ABA Model Rules of Professional Conduct for lawyers, nevertheless it impacts mediations conducted by non-lawyers and non-ABA attorneys who act as third-party neutral mediators. The extent of its impact remains to be seen. This article discusses the Ethics Opinion's holdings and the Ethics Committee's comments, their application to mediations with unrepresented parties, and their effect if any on the trend of mediator proposals. First, however, some context for the discussion is offered.

II. Possible Reasons for the Ethics Opinion

There is no legislative history or extrinsic background information for ABA ethics opinions. Presumably, this is to protect the Ethics Committee's confidential and candid deliberations on ethical issues, to insulate the Committee from outside influences, and to make the Opinions self-contained so that they stand on their own. Therefore, we can make only educated guesses on reasons why this particular opinion was issued, including the following:

A. Drawing a line between permissible suggestion and prohibited recommendation by lawyer-mediators.

B. Protecting the fundamental mediation principles of party self-empowerment and self-determination.

C. Growing trend of evaluative mediators such as retired judges and subject matter experts who are accustomed to giving their subjective opinions.

D. Encouraging affordable access to "justice" and our "legal system", including use of:

   1. Mediation without legal representation, and
   2. Limited scope representation whereby parties engage a lawyer to handle only certain designated aspects of a legal matter and the client remains responsible for all other aspects on their own or with the lawyer's advice.

E. Escalating cost of legal representation and litigation, which makes mediation without legal representation an attractive alternative.

F. Prevalence of unrepresented parties in family and probate mediations.

   The growth of artificial intelligence use presents its own set of challenges to mediation, a sort of "the Good, the Bad, and the Ugly" of AI. The Good of AI is that it facilitates direct engagement by unrepresented parties in mediation by giving them confidence that they can submit professional-looking written pre-mediation materials and can competently