



Origin and Application of Just Cause (Part One)

Introduction

“Just cause”¹ is one of the shortest clauses in any collective bargaining agreement. It is also the most difficult to apply when disciplining or discharging an employee. From these two words spring seven tests that must be reviewed and applied in almost every discipline or discharge case. To complicate matters, the parties sometimes alter the general just cause standard through the collective bargaining process.

Just cause principles affect discipline; thus the phrase “just cause” is a mandatory subject of bargaining under Oregon’s collective bargaining laws.² It’s no secret that the Oregon Education Association and Oregon School Employees Association bargain hard to place just cause standards in contracts that don’t have them and keep just cause standards in contracts that do. Administrators and superintendents “bargain”³ to place just cause in their contracts as well.

To help you understand the importance of the just cause standard and meet its tests, this article:

- R** describes the origin of the just cause standard;
- R** clarifies the difference between just cause and due process;
- R** briefly discusses three practical considerations regarding the just cause standard;
- R** illustrates the interpretation and application of the seven just cause tests.

A future article will discuss modification of the just cause standard during bargaining, its impact on dis-

cipline and dismissal procedures for licensed and classified employees, and the arbitration process in just cause cases.

Origins

The general just cause standard arose from an arbitration case decided in 1966.⁴ In that case, an employee was terminated for unsatisfactory work and refusal to work as directed. The contract included language saying management had the right to discipline or discharge employees for “cause” and employees should not be discharged or disciplined except for “proper cause.” Arbitrator Carroll R. Daugherty observed that no provision in the contract defined these terms,⁵ so he decided he had to supply and apply his own just cause standards to the case. In an appendix, he set forth seven questions, all of which had to be answered affirmatively for him to conclude a just cause standard had been met.⁶ He also included some interpretative notes to further describe the application of the seven questions. These seven questions are widely cited as the appropriate “formula”⁷ for determining whether an employee’s actions have met a contractual (or policy)⁸ just cause standard.

Arbitrator Daugherty’s definition of just cause is not the only one in use but is commonly referred to when negotiating or arbitrating over just cause language. A subsequent article will explore other definitions and sources of a just cause standard.



Due process vs. just cause

There is a tendency to use the phrases “due process” and “just cause” interchangeably. They are not interchangeable, however. Each phrase is a shorthand expression for a process, each process is different from the other, and each process may be modified through collective bargaining.

The phrase “due process” comes from the Fourteenth Amendment to the U.S. Constitution which reads in part, “[N]o state shall . . . deprive any person of life, liberty or property, without due process of law . . .” The word “state” has been interpreted to mean, among other things, any local public employer. The word “property” has been interpreted to mean, among other things, a “legitimate expectation of entitlement to continued public employment.” For purposes of this article, school district employees have a property interest in their jobs and are therefore entitled to due process before discipline or discharge.

As a procedure, due process is not defined in the constitution or state law. The courts have interpreted due process to mean the employee must be notified of the specific charges, possible sanctions, and events or evidence supporting the charges and must have an opportunity to give his or her side of the story before being disciplined or discharged. In cases of discharge, due process requires a hearing after discharge. State law, board policies, collective bargaining agreements, individual contracts, staff handbooks, and other sources may grant additional rights or procedures⁹ as part of due process procedures.¹⁰ Due process is required in cases of discipline or discharge regardless of whether school district contracts, policies, etc. refer to it.

“Just cause” incorporates the basic due process concepts of notice and opportunity to respond before discipline or discharge. Just cause, however, is shorthand for a formula that includes seven tests or questions, each of which must be answered affirmatively before an employee can be disciplined or discharged. Unlike due process, just cause is required only if specified in collective bargaining agreements, individual contracts, or other sources.

Due process and just cause may be modified during the collective bargaining process. A subsequent article will describe and illustrate modifications that can result from negotiations.

Practical considerations

Before agreeing to use a just cause standard for discipline and dismissal, you should carefully consider the history and application of a just cause standard. There are three practical considerations, however, that make your decision easier.

1. A just cause standard requires application of seven questions or tests. Arbitrators differ, however, in how they apply those tests and if they even require all seven to be met in every case. One reference describes it this way:

“ . . . The just cause standard presents a cluster of issues (such as the scope of the arbitrator’s authority versus that of the employer) and consists of a number of different elements, and some arbitrators emphasize one whereas some give more weight to others. Proof of misconduct is the key for some; others tend to stress due process considerations, such as the employer’s obligation to investigate all the circumstances before making any decision about discipline. Finally, some arbitrators emphasize ‘equity over law,’ stressing the spirit rather than the letter of the just cause standard . . .

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Another caveat regarding the seven tests is that one or more negative answers to the questions do not necessarily mean that discharge or other discipline is not justified. This is most often the case where the arbitrator finds that the employer’s investigation was deficient in some respect. If the deficiency was such that the grievant was not prejudiced, the arbitrator may well see no reason to disturb the discipline imposed by the employer. Similarly, a failure to



meet the literal requirements of notice, reasonable rule, equal treatment, and penalty may be excused by the arbitrator, either because there was no demonstrable injury to the grievant or because the employer acted within the bounds of its reasonable discretion.”¹¹

Although arbitrators tend to treat the seven just cause tests as “academic silly putty,” you should always prepare your case to meet all seven tests. Unfortunately, if an arbitrator applies all seven tests, you will most likely lose your case because the first just cause test requires you let your employees know in advance that particular conduct or activities will result in discipline. But it’s impossible for you to know in advance all types of potential employee misbehavior and then give the required advance notice.¹²

2. Most of the seven tests use subjective language like “reasonably related,” “fairly and objectively,” and “evenhandedly.” Districts and union representatives usually disagree about whether the district acted within the meaning of these phrases, so the grievance process is automatically initiated in almost every case. Ultimately, an arbitrator determines if and to what extent discipline will be imposed.

Automatic litigation is often initiated over even the more concrete requirements such as an “objective” investigation. For example, in one case, both the school district and local city police conducted a concurrent investigation. The union still challenged the investigation procedure during arbitration.¹³

3. The parties commonly disagree over what is and is not “discipline,” triggering the just cause procedure. There are clear examples of discipline, such as a written reprimand or suspension. But sometimes other actions occur, and the question becomes whether the action was or was not discipline. For example, a memorandum written to a teacher expressing performance concerns, emphasizing positive performance areas, and stating it was not a reprimand was not “discipline” requiring just cause.¹⁴ Letters from parents

expressing dissatisfaction with a teacher’s performance placed in the personnel file were not “discipline” requiring just cause.¹⁵ The disagreement over what is and is not discipline continues. Almost any “adverse” document (such as a negative evaluation or plan of assistance) placed in a personnel file or action (such as an involuntary transfer) will be challenged as “discipline” requiring just cause.

There are some good reasons to avoid adding a just cause standard to a contract. First, the just cause test for advance notice is virtually impossible to meet. Second, most of the just cause tests use subjective language, so there is disagreement over school district actions in virtually all cases of discipline or dismissal. Finally, there is common and continuing disagreement over what actions are or are not discipline, so a grievance is likely just on that issue. Districts sometimes prevail, but a just cause standard makes arbitration all but inevitable in every case.

The seven tests

This section includes:

- R each just cause test in the form of a question;
- R an explanation of how it is applied;
- R examples from actual cases or other experience;
- R suggestions for minimizing grievances or other litigation.

Test #1

Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

Explanation: According to arbitrator Daugherty, a district may give advance notice orally or in writing. Districts usually develop rules for employee conduct and behavior during work hours¹⁶ and communicate them in written form in policies, employee handbooks, and posted notices and verbally to individuals and groups (for example, at inservice activities.)

Examples: It’s impossible to anticipate all types of



employee misconduct and then notify employees in advance that these activities are prohibited. For example, in one unexpected case a special education teacher kept a loaded handgun in his classroom in an unlocked desk drawer. In another case, an elementary teacher rode her motorcycle onto the elementary playground when students were at recess. To complicate matters, she had obscene words and phrases painted on her motorcycle helmet. In a third case, a physics teacher, as part of an experiment in his classroom, with students present, discharged a black powder rifle into a log brought in from outside. No one expected these behaviors, so no advance warnings had been given. In cases from outside Oregon, arbitrators overturned or reduced discipline when employees were not told in advance they could not do such things as attend college classes while on sick leave, punch another employee's time-card, or load non-job-related copyrighted computer programs into office computers.

Arbitrators, at least in theory, are not unsympathetic to the advance notice problem. In general, they acknowledge there are certain types of conduct every employee should know will not be tolerated on the job, a common-sense approach to the issue. These types of conduct include theft, destruction of property, threats of bodily harm, sexual harassment, selling drugs, insubordination, drinking on the job and dishonesty. Even if this is common sense, it doesn't prevent an automatic challenge from the union contending there was no advance notice or warning regarding discipline for these types of conduct.

Suggestions: Make sure all work rules and directives are in clear written form. If you provide any rules or directives verbally, you should also communicate them in writing and clearly describe penalties for noncompliance, especially conduct that can or will result in discharge. Review school board policies and work rules with employees annually. Ask each employee to acknowledge in writing that he or she has read them, attended a staff inservice about them, or both, and place the written acknowledgment in each personnel file. In any individual discipline such as a written reprimand, always state that any additional

violation(s) "will result in discipline up to and including discharge." Work constantly to identify potential types of employee misconduct and incorporate their prohibition into policies, work rules and staff handbooks. In cases of individual employee misconduct, intervene and correct the problem immediately.

Test #2

Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer's business and the performance that the employer might properly expect of the employee?

Explanation: This question requires you to analyze three factors: efficiency, safety and job performance requirements. When setting policies or administrative rules and making daily decisions, you should always keep in mind their links to school district operations, especially efficiency and safety. For example, some rules related to parking, being on time for work, and prohibiting smoking are based on efficiency and safety. Other policies and rules have direct links to employee job performance.

Few argue that an employer does not have the right to make reasonable rules and give reasonable orders in the conduct of its business. In fact, many management rights clauses in current collective bargaining agreements specify or emphasize this right. The problem, however, is the subjective nature of the word "reasonable." School boards and employee unions can and do disagree over whether particular rules or directives are reasonable. With a just cause standard, a third party arbitrator, not the school board, will ultimately decide whether a rule is reasonable.

Examples: To be considered unreasonable, a rule or directive generally falls into one of these categories:

1. It is inconsistent with union contract language.
2. It conflicts with established past practice.
3. It affects life "on the job" in a way that is deemed unreasonable.
4. It affects or is based on employees' private



lives away from the job;

5. It is deemed arbitrary, capricious or discriminatory

Suggestions:

1. To ensure consistency with union contract language, supervisors should be familiar with union contracts and the particular contract language that govern employees they supervise.

2. To avoid conflict with established past practice, become familiar with past practice regarding board policies and contract language, prohibit exceptions to policy and contract requirements, and note any deviations for subsequent discussions with supervisors.

3. To make sure “on the job” rules are reasonable, identify the demonstrable business need – efficiency, personal or employee safety, public courtesy, etc. – underlying rules governing such things as dress and grooming, eating,¹⁷ music at the work station, and even personal relationships between employees. If there is no demonstrable business need, an arbitrator may conclude the rule or directive is unreasonable and an insufficient basis for discipline.

4. You must be able to show an actual connection between the off-duty conduct and an employee’s job responsibilities while at work for a rule or disciplinary decision to be deemed reasonable. For example, an employee who is seen in taverns while off duty and who may even engage in occasional fights may not be subject to discipline at work unless the conduct has a demonstrable negative impact on his or her job performance.

5. Arbitrary rules are generally those that are inflexible or applied without a sensible pattern or explanation. Capricious rules are those administered for the personal convenience or at the whim of a supervisor. Discriminatory rules are those that allow unequal treatment of employees for any reason.

In general, you should always be able to link policies, rules and decisions to school district operations, especially efficiency and safety concerns. Supervisors should be aware of applicable school board policies and contract language and set workplace rules

that are consistent with those policies, contract language and the local work environment.

Test #3

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

Explanation: There are basic procedures you can and should follow to determine if wrongdoing occurred and survive a union grievance.

Examples: There are no set definitions or guidelines that illustrate the “make an effort to discover” wrongdoing test. Oregon arbitration cases range from no investigation¹⁸ (insufficient) to a concurrent investigation with city police¹⁹ (not generally required). Clearly, rumor and hearsay are insufficient.

Suggestions: Conduct investigations in a timely manner. For example, an allegation that a staff member inappropriately touched a student should trigger an immediate district response. During arbitration, the timeliness of the investigation will influence an arbitrator’s assessment of the seriousness of the alleged misconduct.

Interview the accused employee. Under state law²⁰ and many collective bargaining agreements, the employee may have a representative accompany him or her. District policy or the collective bargaining agreement may require you to give the employee a copy of any written complaints. It may require a meeting between the employee and complaining party. The employee may respond fully to the allegations or say little or nothing on advice of the union representative or personal attorney. What the employee says at this point is not as important as the fact that he or she had opportunity to fully explain events from his or her point of view.

Interview other witnesses,²¹ including students. Then reinterview the accused employee to gather information on unresolved issues, clarify statements and observations, etc. Solicit from the employee suggestions



regarding other witnesses or information that may be helpful. Then pass your recommendation along to individuals who will decide whether to impose discipline or discharge.

If an employee is charged with a crime, conduct your own investigation and reach your own conclusions regarding employee misconduct. Don't simply place the employee on paid leave and wait for the outcome of any criminal case. School districts and law enforcement agencies have different standards for investigations.

Districts with a just cause standard:

R need only "reasonable suspicion" to conduct search and seizure or other actions;

R may suspend an employee without pay at any time and not allow him or her to return to work until the investigation is completed;

R must find substantial evidence of wrongdoing.

Law enforcement:

R may need a warrant or probable cause before they can act;

R depending on the nature of the offense, may simply cite and release an employee to return to work the next day;

R must prove guilt beyond a reasonable doubt.

There may be sufficient evidence for you to take disciplinary action or discharge an employee while the district attorney never brings formal charges. This is exactly what happened in a case involving allegations that a school district classified employee inappropriately touched three female middle school students. The school district successfully discharged the employee under a just cause standard, but the district attorney concluded he did not have enough evidence to prosecute.²²

Test #4

Was the employer's investigation conducted fairly and objectively?

Explanation: A just cause standard requires a "fair and objective" investigation. The words "fair and ob-

jective" are subjective, so a union disagreement with and challenge to district actions are almost always automatic.

Example: In one case, the union challenged the concurrent investigations by the school district and city police claiming they did not comply with the "fair and objective" standard.²³

Suggestions: Use some common sense. If the supervisor is also the only witness, someone else should conduct the investigation. If the issue is sexual harassment or inappropriate touching, a male/female team should investigate.

Forward results of the investigation to the individual who will make the decision to discipline or discharge. That individual can then conduct any follow-up or additional interviews, gather additional information, etc., before making a decision. He or she should make sure any complaint or discipline procedures in school board policy or contract language have been followed meticulously.

Test #5

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

Explanation: The just cause standard requires "substantial evidence" before discipline or discharge is imposed. Without a clear working definition, it's very difficult to define and apply this test. Suspicions, assumptions, possibilities, coincidences, etc., are not sufficient bases for discipline or discharge. You must submit the right quantity and quality of evidence.

Some arbitrators contend the amount of proof needed should depend on the nature of the offense. With issues like theft, some believe the standard should be the criminal law proof, "beyond a reasonable doubt." Some favor a lower standard of "clear and convincing evidence" while others favor the civil law standard of "preponderance of the evidence." These levels of evidence can be described as follows:



a. *Beyond a Reasonable Doubt*

Used in criminal cases. This level of evidence is generally defined as “an extremely high degree of probability” that certain facts exist.

b. *Clear and Convincing*

Used in some civil cases such as contract reformation, civil commitment, termination of parental rights, etc., where courts generally require more persuasive proof than simply preponderance. It is generally defined as persuading the judge or jury that the existence of certain facts is “highly probable or much more probable than not.”

c. *Preponderance*

Used in most civil cases, this level generally describes a state of proof in which the “weight of the evidence” favors or does not favor a particular conclusion. It is evidence that persuades a judge or jury that points in question are “more probably so than not.” Preponderance refers neither to the number of witnesses nor to the volume of evidence but to the convincing force of the evidence.

Examples: When applying the “substantial evidence” just cause test, Oregon arbitrators often require a “clear and convincing” level of proof for more serious offenses.²⁴ In other cases, they require a “preponderance of evidence” to support a school district’s decision.²⁵

Suggestions: Conduct your own investigation of alleged employee misconduct, even when the employee has been charged with a crime. The investigation should be timely and thorough. Consider carefully who should conduct the actual investigation and who should be interviewed. The evidence should be enough to meet the “preponderance” or “clear and convincing” tests. Forward the evidence and recommendations to the superintendent or other decision-maker for independent review before making discipline or discharge decisions.

Test #6

Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all

employees?

Explanation: In this test, “discrimination” doesn’t refer to classifications found in federal or state law such as race, color, religion, sex, national origin, marital status, age, expunged juvenile record, and union membership. Instead, it refers to unequal treatment of employees for any reason. To answer this question, you need to determine whether a district policy, rule, or directive has been violated, and whether other employees have been similarly disciplined for that or a similar violation.

Examples: When districts fail to meet this test, it’s usually because managers:

R didn’t know about previous infractions by other employees when preparing to discipline an employee for a current violation;

R inconsistently enforce district policies and procedures;

R apply different penalties to the same or similar violation.

For a variety of reasons, you may not be aware of every infraction committed by every employee. Sometimes during the grievance process, an employee or representative shows that other employees committed previous violations without being disciplined. For this defense to hold up, however, the employee must show that the district knew or should have known of the previous infractions (“constructive knowledge”) and with this knowledge, failed to act.²⁶

Sometimes work rules or orders are enforced in a way that is obviously inconsistent. For example, your district may set policies or procedures on dress codes or Internet use. During an investigation into an alleged violation, you may discover building-level supervisors themselves have disregarded the very policy or procedure they are now trying to use as a basis for disciplining a teacher or classified employee. This inconsistency will certainly be brought to the arbitrator’s attention during litigation.

Finally, there are occasional instances of different penalties for the same infraction. For example, two



custodians may continue to arrive late to work. One may receive a verbal warning and one may have a written reprimand placed in his or her personnel file.

Suggestions: To avoid inconsistent enforcement, you should make sure an appropriate system is in place to ensure all staff members, including the superintendent, comply with current policies and procedures, especially if a just cause procedure is in place.

It is difficult and probably unwise to set up a “discipline matrix” that pairs a set discipline with a particular infraction. But you should review discipline history in other cases and try to impose the same discipline for the same or similar infraction. There is only one exception to this same infraction/same penalty rule, described in the next section.

Test #7

Was the degree of discipline administered by an employer in a particular case reasonably related to the seriousness of the employee’s proven offense and the record of the employee in the employee’s service with the employer?

Explanation: This test generally requires your actions to be corrective and rehabilitative rather than punitive. The parties and arbitrators sometimes use the phrase “progressive discipline” as a shorthand way of referring to this just cause test. Arbitrator McCoy defined the phrase progressive discipline as early as 1949:

[T]he company imposes a mild penalty for a first offense, a somewhat more severe penalty for a second, etc., before abandoning efforts at correction and resorting to discharge. . . . The theory is that this is in the interest of both management and employees. . . . I might hold a discharge without any prior discipline whatever proper in the case of some offenses; in the case of other offenses it might be held that discharge did not become reasonable or necessary for a long time and until after many fruitless efforts at correction.²⁷

In 1955 McCoy elaborated on this concept, descri-

bing cases when progressive discipline principles would and would not be required:

R those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline;

R those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction.²⁸

Examples: There is no set “progressive discipline” formula. Generally, progressive discipline consists of:

- R** verbal warning;
- R** written warning;
- R** suspension without pay (length varies)
- R** demotion (when applicable);
- R** “last chance,” agreement (rare); and ultimately
- R** discharge.

Some activities such as using alcohol or other drugs on the job, stealing, altering college transcripts,²⁹ falsifying a job application by listing a non-existent college degree,³⁰ making harassing and obscene phone calls,³¹ and insubordination³² do not require progressive discipline before discharge.

Arbitrators approach this issue in different ways. With a just cause standard, they will examine the level of discipline imposed in the current case and any previous discipline imposed. Depending upon the severity of the infraction, they may decide a written reprimand was an appropriate first step. They may decide the discipline imposed was too severe³³ or that progressive discipline was not but should have been applied. They may conclude the contract itself requires a specific penalty, which was not imposed.³⁴ They will consider any mitigating circumstances and the length and quality of the particular employee’s service when determining if the discipline imposed was appropriate³⁵ (an exception to the same infraction/same penalty just



cause test.)

Suggestions: Everyone in your district who supervises employees should be aware of and follow progressive discipline principles. Exceptions should be based on contract language, severity of infraction, or the employee's service record. In some cases, if the infraction is severe enough, progressive discipline is not required.

Conclusion

The two words "just cause" add complexity to

employee discipline and discharge cases. A just cause standard consists of seven tests or questions. Each question requires an independent analysis and an affirmative answer. If you do not meet one or more tests, you will likely lose your case before an arbitrator. If your current collective bargaining agreements do not contain just cause standards, you would be well-advised to consider the information presented here before beginning negotiations, since the union likely will propose a just cause standard in some form.

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1. There is some debate over whether a word such as “cause” or phrase such as “proper cause” is different from “just cause.” The parties in their contracts may have defined these terms, in which case they may be different from the general “just cause” framework because of the way they are defined. If these terms are not defined in the contract, or not defined differently from the general just cause framework, they equate to a just cause standard. See *Koven, Adolph and Smith, Susan, Just Cause The Seven Tests*, p.1 (2nd Ed.1992). See also *In the Matter of the Arbitration Between Oregon School Employees Association, Chapter 145, and Jewell School District No. 8*, Howell L. Lankford, arbitrator (April 28, 1992) (“good cause” standard) and *In the Matter of the Arbitration Between SEIU Local 140 and Portland Public Schools*, Bryan M. Johnston, arbitrator (April 24, 1993) (“cause” equals just cause).
2. See *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, Case No. C-61-78, 5 PECBR 2771, 2780-81 (1980); modified, __PECBR__(1980).
3. Administrators and superintendents are excluded from coverage by Oregon’s collective bargaining law and the federal National Labor Relations Act. See, e.g., ORS 243.650 (6), (19) and (23) (defining confidential and supervisory employees). Some school districts currently “bargain” with groups of their administrators over employment terms and conditions. Although they are not required to do so, school districts also typically “bargain” or negotiate with their current or prospective superintendents over contract terms. School boards should be wary of and consult with legal counsel prior to the inclusion of a just cause standard in administrator or superintendent contracts.
4. See *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (1966).
5. This lack of definition is common in many current collective bargaining agreements with both teachers and classified staff. It is also common in administrator and superintendent contracts which use the term “cause” or phrase “just cause.”
6. Arbitrator Daugherty wrote: “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.”
7. “Formula” is a term for ease of expression only. Arbitrator Daugherty cautioned in later writings that his “questions and notes” did not represent an effort to compress all of the facts in a discipline or discharge case into a formula. The tests should be used as a framework to aid in the decision making process. “There is no substitute for sound human judgment,” he wrote.
8. School district personnel continue to be surprised when reviewing their board policy manuals. It is not uncommon to find board policies related to discipline and dismissal that use “cause” or “just cause” terminology even though it is not found in the collective bargaining agreements or personnel contracts. District personnel should review their current policies regarding discipline and dismissal, if any, and plan accordingly for future discipline and discharge cases.
9. See, e.g., *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90, 12 PECBR 693 (1991). In that case, the Employment Relations Board affirmed an earlier decision that employees who attend an investigatory interview which might reasonably result in discipline are entitled to union representation. The *Washington* case defined the role of that union representative during the interview.
10. A subsequent article will discuss the interaction of due process and a just cause standard with statutory procedures regarding contract nonrenewal and dismissal of probationary teachers and administrators and dismissal and contract non-extension of contract teachers and non-probationary administrators.
11. See *Koven, Adolph and Smith, Susan, Just Cause The Seven Tests*, pp 21 and 26 (2nd Ed. 1992).
12. The author has been working with school districts for over 15 years. His list of unanticipated employee misbehavior grows monthly.
13. See *In the Matter of the Arbitration Between Philomath School District No. 17J and Oregon School Employees Association, Chapter No. 64*, Thomas F. Levak, arbitrator (Sept. 19, 1993).



14. *In the Matter of the Arbitration Between Bandon Education Association and Bandon School District No. 54*, Jack H. Calhoun, arbitrator (March 12, 1992).
15. *In the Matter of the Arbitration Between Paisley Education Association and Paisley School District*, Gary L. Axon, arbitrator (June 13, 1992).
16. School Boards occasionally develop rules regarding “after hours” conduct. The extent, if any, to which school boards can regulate this conduct and impose discipline or dismissal is beyond the scope of this article.
17. Rules related to dress and grooming and eating and drinking at an employee’s work station were a matter of some debate when Senate Bill 750 was enacted in 1995. One of the enumerated exclusions from employment relations in ORS 243.650(7)(e) is “reasonable dress, grooming and at work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct.” The genesis of this exclusion can be traced to a 1989 ERB decision determining that smoking was a mandatory subject of bargaining.

In that case, the ERB noted that, like drinking coffee or chewing gum, “[s]moking is simply one of the many *personal* activities which employees often engage in during the performance of their duties.” The board went on, however, making the crucial statement, albeit in dicta, that “[o]n balance, such personal pursuits of employees during the performance of their duties are mandatory subjects for bargaining.”

Six years later, a school superintendent described the implications of the ERB’s decision before the Senate Labor and Government Operations Committee on March 8, 1995. The superintendent testified that the school board and administration previously had asked teachers to refrain from drinking coffee or pop in the halls and during class. The request was made in conjunction with district goals to maintain safe, clean buildings and to promote productive learning and working conditions. District atmosphere promoting professionalism among staff and the respect of students and patrons. The district issued a directive to staff regarding person dress and beverages in the work areas. The union demanded to bargain over the directive. These types of disputes helped shape the grooming and personal conduct exemption in ORS 243.650(7)(e).
18. See *In the Matter of the Arbitration Between Mt. Hood Community College and Mt. Hood Community College Classified Employees Association*, Richard V. Stratton, arbitrator (Dec. 18, 1997).
19. See *In the Matter of the Arbitration Between Philomath School District No. 17J and Oregon School Employees Association, Chapter No. 64*, Thomas F. Levak, arbitrator (Sept. 19, 1993).
20. See *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90 PECBR 693 (1991). In that case, the Employment Relations Board affirmed an earlier decision that employees who attend an investigatory interview which might reasonably result in discipline are entitled to union representation. The *Washington* case defined the role of that union representative during the interview. The basis for this case and decision was ORS 243.672(1)(a).
21. Practical problems result from complaints by other employees. Typically, they are reluctant to talk with the errant staff member or follow the school district’s complaint procedure.
22. See *In the Matter of the Arbitration Between Philomath School District No. 17J and Oregon School Employees Association, Chapter No. 64*, Thomas F. Levak, arbitrator (Sept. 19, 1993).
23. *Id.*
24. See, e.g., *In the Matter of the Arbitration Between Southern Oregon Bargaining Council and Eagle Point School District No. 9*, Sherman B. Kellar, arbitrator (April 14, 1996) (several incidents including theft); *In the Matter of the Arbitration Between Oregon School Employees Association Chapter 22 and Josephine County School District*, Timothy D. W. Williams, arbitrator (Jan. 20, 1983) (assault); *In the Matter of the Arbitration Between Oregon School Employees Association, Chapter 1 and Eugene School District 4J*, George Lehleitner, arbitrator (Dec. 9, 1992) (theft); *In the Matter of the Arbitration Between Salem-Keizer Association of Classified Employees and Salem-Keizer School District*, Sandra Smith Gangle, arbitrator, (May 19, 1994) (sexual harassment).



Endnotes

25. See, e.g., *In the Matter of the Arbitration Between Mid-Valley Bargaining Council and Corvallis School District 509J*, Ted Heid, arbitrator (Aug. 1, 1988) (excessive physical force used on student); *In the Matter of the Arbitration Between Salem Education Association and Salem Keizer School District 24J*, Eric B. Lindauer, arbitrator (Jan. 14, 1992) (inappropriate comment to students).
26. There is no clear guidance indicating how the district will have constructive knowledge that previous violations have occurred. It is helpful to examine recent court decision on sexual harassment cases under Titles VII and IX. In Title VII cases (employer/employee harassment), if any “agent” of the employer knows of the harassment the employer is deemed to have constructive knowledge or “should have known” of the harassment. In Title IX cases (employee/student harassment) an individual, who has authority to address the alleged harassment and institute corrective measures, must know of the harassment before the employer is deemed to have knowledge of the harassment. It is unclear which standard, if either, applies in a just cause analysis.
27. *International Harvester Co.*, 12 LA 1190, 1193 (1949).
28. *Huntington Chair Corp.*, 24 LA 490, 491 (1955).
29. *In the Matter of Arbitration Between Lane Community College and Lane Community College Employees Federation*, Carlton J. Snow, arbitrator (April 24, 1997).
30. *In the Matter of Arbitration Between Portland Community College and Portland Community College Faculty Federation*, Ross R. Runkel, arbitrator (May 5, 1992).
31. *In the Matter of Arbitration Between Oregon School Employees Association Chapter 22 and Josephine County School District*, Timothy D.W. Williams, arbitrator (Jan. 20, 1983).
32. *OSEA v. Sandy Elementary School District #46*, Case No. UP-62-94, 15 PECBR 884 (1995).
33. See *In the Matter of Arbitration Between Oregon School Employees Association and Hillsboro Union High School District No. 3*, Howell L. Lankford, arbitrator (March 4, 1998) (two weeks of unpaid suspension rather than discharge since warning letter did not indicate employee would be fired for next offense and prior “discipline” was suspension with pay).
34. See *In the Matter of the Arbitration Between Mt. Hood Community College and Mt. Hood Community College Classified Employees Association*, Richard V. Stratton, arbitrator (Dec. 18, 1997) (contract required pay deduction for time absent for failure to report absence due to illness).
35. See *In the Matter of the Arbitration Between Oregon Dept. of Education and State Teachers Education Association*, Sylvia Skratek, arbitrator (Feb. 6, 1998) (written reprimand rather than two week suspension without pay appropriate for employee with 22 years of service and no prior discipline) and *In the Matter of the Arbitration Between SEIU Local 140 and Portland Public Schools*, Bryan M. Johnston, arbitrator (April 29, 1993) (suspension without pay modified from five days to three days for employee with 20 years of service and no prior discipline).