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Harvey M. Shrage

Curt L. Hamakawa

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INVESTIGATIVE REPORTS: WHAT ARE THEY WORTH BEFORE A LABOR ARBITRATOR?

Harvey M. Shrage* & Curt L. Hamakawa**

INTRODUCTION

With the passage of the National Labor Relations Act in 1935, employees gained the right “to bargain collectively through representatives of their own choosing.”¹ Through the bargaining process, employers and unions have generally agreed to require that the employer have just cause to discipline employees covered by the collective bargaining agreement.² In 1964, arbitrator Carroll Daugherty developed a seven-part test to determine whether an employer’s discipline of an employee can be upheld as being supported by just cause:

- (1) Did the company give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequences of the employee’s conduct?³

*Professor of Business Law at Western New England University, where he teaches courses in labor-management relations and employment law. Professor Shrage has been a labor arbitrator in private- and public-sector arbitration since 1988 and has served on hearing panels for the American Arbitration Association, Federal Mediation and Conciliation Service, and several permanent arbitration tribunals.

**Professor of Sport Management at Western New England University, where he teaches courses on international sport management, governance and compliance, and sport law. Professor Hamakawa was formerly associate general counsel for the United States Olympic Committee and subsequently, its director of international relations. He is also the founding director of the Center for International Sport Business at Western New England University.

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1. National Labor Relations Act of 1935, 29 U.S.C. § 157 (West 2019).

2. See FRANK ELKOURI, ELKOURI & ELKOURI: HOW ARBITRATION WORKS, 931 (Alan Miles Ruben ed., 6th ed. 2003); see also Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 832 (1991).

3. Grief Bros. Cooperage Corp. v. United Mine Workers of Am., Dist. 50, Local 15277, 42 Lab. Arb. Rep. (BNA) 555, 558 (1964) (Daugherty, Arb.); Enter. Wire Co. v. Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359, 363 (1966) (Daugherty, Arb.).

(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?⁴

(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?⁵

(4) Was the company's investigation conducted fairly and objectively?⁶

(5) At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?⁷

(6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?⁸[; and]

(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?⁹

Under the Daugherty standard, an employer must be able to answer in the affirmative to each of the seven questions in order to demonstrate just cause.¹⁰ Some arbitrators have criticized Daugherty's test as being too focused on the investigatory factor and recommend its use as a guideline rather than a strict formula.¹¹ Given the formulaic nature and

4. *Enter. Wire Co.*, 46 Lab. Arb. Rep. at 363.

5. *Id.*

6. *Id.* at 364.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* ("A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist.")

11. Howell L. Lankford et al., *Did He Do It?: Employer Handbook 'Just Cause' Meets the Collective Bargaining Agreement*, 17 in ARB. UNDER OR. PECBA 2003, at 22 (Or. Lab. Educ. Res. Center Monograph Ser. Issue 17, 2003); see also *Saint-Gobain Containers, Inc. v. Glass Workers Int'l Union*, Loc. 226, 132 Lab. Arb. Rep. (BNA) 116, 126 n.10 (2013) (Wolff, Arb.) (arguing that Arbitrator Daugherty's just cause standard is misplaced because the seven questions are based on his experience as an arbitrator under the National Railroad Adjustment Board of the Railway Labor Act, where the procedures are not *de novo*).

emphasis on the investigatory element – i.e., whether an investigation was conducted and if so, whether it was fair and objective such that it yielded substantial proof in support of the allegations of wrongdoing – Daugherty’s test is accepted more in the vein of guidance versus rule.¹²

Whatever definition of just cause is applied, factors considered by arbitrators to determine whether there was just cause concern some procedural obligation on the part of the employer prior to imposing discipline.¹³ Most obviously, employers are required to prove that the employee actually engaged in the alleged misconduct,¹⁴ which necessarily requires that an employer conduct a complete investigation.¹⁵ As noted by Blancero and Bohlander, “[a] thorough investigation is critical to upholding any charge of employee wrongdoing.”¹⁶ Before an employer can impose discipline on an employee covered under a collective bargaining agreement, the employer’s investigation must aim to determine the underlying facts necessary to establish just cause for the discipline.¹⁷ An employee who is disciplined and believes that the

Whatever their virtues in the railroad industry, the indiscriminating transfer of these tests to the private sector, where hearings before an arbitrator are *de novo* and an almost infinite variety of grievance arrangements are found, is inappropriate. Designed for an arbitration system different from the one in which they are now employed, the tests generate a vague confusion about the meaning of due process further compounded by the pretense that they simply reflect prevailing practice.

Id. (quoting JOHN E. DUNSFORD, *Arbitral Discretion: The Tests of Just Cause*, in ARBITRATION 1989: THE ARBITRATOR’S DISCRETION DURING AND AFTER THE HEARING, PROCEEDINGS OF THE FORTY-SECOND ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 35 (Gladys W. Gruenberg, ed., 1990)); see also N.C. Dep’t of Env’t & Nat. Res. v. Carroll, 599 S.E.2d 888, 900 (N.C. 2004) (reasoning that the just cause “inquiry requires an irreducible act of judgment that cannot always be satisfied by mechanical application of rules and regulations.”).

12. Lankford, *supra* note 11, at 22.

13. *Id.* at 23. Additionally, in the public sector, due process safeguards are imposed: Public-Sector employees who are found to have more than a unilateral expectation of continued employment are said to have a property interest in their employment, which may not be taken away without procedural due process. This procedural due process requires two key elements; notice and the opportunity to be heard. In *Cleveland Board of Education v. Loudermill* the Supreme Court explained that a public employee with a property interest is, at a minimum, 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” before the proposed action is taken.

2014 AAA LEXIS 127, at *28 (2014) (Sambuco, Arb.).

14. See Margaret A. Lucero & Robert E. Allen, *The Arbitration of Cases Involving Aggression Against Supervisors*, 53 DISP. RESOL. J. 57, 62 (1998).

15. See Donna Blancero & George W. Bohlander, *Minimizing Arbitrator ‘Reversals’ in Discipline and Discharge Cases*, 46 LAB. L. J. 616, 620 (1995).

16. *Id.* For a more complete discussion of the just cause standard and specifically the requirement that the employer conduct an investigation, see Harvey M. Shrage, *The “Just Cause” Standard: Is an Investigation Needed?*, 3 ROCKY MTN. L.J. 17, 21-22 (2015).

17. Shrage, *supra* note 16, at 22.

employer did not have just cause can file a grievance under the applicable collective bargaining agreement.¹⁸ Such a grievance procedure will culminate in an arbitration hearing before a neutral arbitrator, where an issue may be raised about the admissibility of the investigatory report and the information contained therein.¹⁹ At the hearing stage of the grievance procedure, the arbitrator determines whether certain evidence will be admitted and if so, what weight will be given to the evidence.²⁰ Franckiewicz argues that the only standard by which arbitrators are bound to when admitting evidence is relevancy.²¹ Thus, arbitrators are granted broad discretion in admitting evidence in arbitration hearings, while at the same time reserving to themselves the weight to be assigned to such evidence.²²

Arbitrators are not bound by the rules of evidence applicable to proceedings in courts of law, and thus are not constrained by the general rule against hearsay evidence.²³ This relaxed standard also enables both parties to the dispute to have wide latitude in making their cases.²⁴ While recognizing the inherent weaknesses of hearsay evidence – including unreliability – some arbitrators nevertheless feel there are good reasons for accepting it.²⁵ As noted by one arbitrator, “frequently, hearsay is the only evidence available in the work place setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result.”²⁶ “An attempt to fit an arbitration hearing within

18. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313, 317 (2007). Approximately 99% of collective bargaining agreements include a grievance/arbitration procedure. *Id.* at 319. Research by the US Bureau of Labor Statistics “found that 99 percent of the collective agreements featured a grievance procedure, and that third-party arbitration was the terminal step in 94 percent of the contracts.” SEAN C. DOYLE, *THE GRIEVANCE PROCEDURE: THE HEART OF THE COLLECTIVE AGREEMENT* 8 (1999), <https://irc.queensu.ca/articles/grievance-procedure-heart-collective-agreement>.

19. See Shrage, *supra* note 16, at 18.

20. See Matthew Franckiewicz, *The Rules of Evidence and Labor Arbitration*, 57 DISP. RESOL. J. 42, 44 (2002).

21. *Id.*

22. *Id.*

23. *Id.* at 46.

24. *Id.*

25. Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 TEX. WESLEYAN L. REV. 533, 538 (2009).

26. *Id.*; Marvin F. Hill, Jr. & Tammy M. Westhoff, “I’ll Take it for What it is Worth” *The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal*, 1998 J. DISP. RESOL. 1, 30 (1998).

the concepts and rules of evidence designed by the courts may do a disservice to the parties.”²⁷ Arbitrator Ernest Marlatt stated:

Arbitrators by training, are presumably better qualified to evaluate the weight of hearsay evidence and put it somewhere on the spectrum between “strongly persuasive” and “vicious gossip.” It stands to reason that the more the arbitrator can learn about the facts, the more likely his award will result in a fair and just decision. For this reason, the arbitrator ought not totally [] exclude any offered evidence unless it is clearly irrelevant or immaterial to any genuine issue in the case.²⁸

Thus, in the interest of a fair result, arbitrators may consider hearsay evidence in order to obtain the clearest and most complete view of the facts.²⁹ Furthermore, as arbitrator George Bowles has observed, the formal rules of evidence are not followed in arbitration hearings to prevent unnecessary restriction:

No doubt the reason that the parties and the Arbitrator are not limited by the formal rules of evidence in an arbitration is the belief that rigid conformity to strict rules of evidence would tend to make the proceeding too technical and unreasonably restrict the parties from offering proofs that enable the Arbitrator to more fully grasp the labor relations situation, properly evaluate the problem, and render a just award.³⁰

Still, arbitrators are bound to arrive at their decisions and awards based on credible evidence, which is why naked hearsay, standing alone and outside of a well-recognized exception, is rarely admitted and even then is accorded little if any weight.³¹ *Sanders v. United States Postal Service* succinctly described the necessity of assessing the weight of hearsay, claiming that “administrative decisions based on hearsay must be evaluated on a case-by-case basis to determine if the hearsay is inherently truthful and more credible than the evidence offered against it. Therefore, hearsay has been held to be substantial evidence in some cases and not in

27. Hill, Jr. & Westhoff, *supra* note 26, at 30.

28. Baker Marine Corp. v. United Steelworkers of Am., Local 8237, 77 Lab. Arb. Rep. (BNA) 721, 723 (1981) (Marlatt, Arb.).

29. See Green, *supra* note 25 (recognizing that in some instances the only evidence available to the arbitrator is hearsay).

30. Bower Roller Bearing Co. v. United Automobile Workers of Am., Local 681, 22 Lab. Arb. Rep. (BNA) 320, 323 (1954) (Bowles, Arb.).

31. *Id.*

others.”³² Looking at how arbitrators deal with police reports in an evidentiary context, for example, it appears that most will admit police reports into evidence under a lenient view of the rules of evidence or under an exception to the hearsay rule.³³ Although generally receiving the police report, arbitrators will not rely solely upon the report or give the report little or no weight.³⁴ However, under certain circumstances arbitrators will receive and rely upon the police report as critical evidence in determining that just cause exists to discipline an employee.³⁵ In such circumstances, the fact that other corroborating evidence exists to support the police report will play a role in the arbitrator’s determination to rely upon the report.³⁶

By design, the standards governing the admissibility of evidence in arbitration proceedings are relaxed in comparison to the rules of evidence adhered to by the courts, in part to encourage the use of the more efficient and less costly arbitration process rather than the judicial system.³⁷ However, as this article will demonstrate, labor arbitrators have held variously as to the admissibility of evidence gathered during the investigatory process leading to the employee’s discipline.³⁸ This article will examine how arbitrators treat investigative reports and statements or evidence collected during the investigatory phase at hearing in light of the relaxed stance regarding admissibility of evidence in arbitration cases.

32. Sanders v. U.S. Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986).

33. Jay E. Grenig & Rocco M. Scanza, *Understanding Evidence (Part III)*, 71 DISP. RESOL. J. 103, 105 (2016) (“Many arbitrators . . . will admit ‘subject to weight’ such relatively routine items as doctors’ statements concerning an employee’s absence because of illness or police reports.”).

34. See discussion *infra* Section II.A.

35. See discussion *infra* Section II.C.

36. See discussion *infra* Section II.C.

37. See generally *Gerdau Ameristeel, Inc. v. United Steel Workers Local 8586*, 132 Lab. Arb. Rep. Supp. (BNA) 633, 638 (2013) (Hoose, Arb.) (highlighting that the rules of evidence do not apply); see also 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:99 (4th ed. 2003), Westlaw (database updated Jul. 2019) (“An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”).

38. See 1 STEVEN M. WOLF, LABOR AND EMPLOYMENT ARBITRATION § 5.07, LexisNexis (database last updated 2020).

I. INVESTIGATIVE REPORTS AS HEARSAY

A. *When Investigative Reports Are Inadequate to Prove Just Cause*

Because of the problematic nature of hearsay, the weight given to investigative reports usually depends on corroborating evidence.³⁹ For example, the arbitrator in *Tarmac Virginia v. Teamsters, Local 592* found that an investigative report from a private investigator who did not testify at the hearing could not alone justify an employee's dismissal.⁴⁰ The employer, a concrete company, hired a private undercover investigator to gather evidence of an employee's purported drug use.⁴¹ The employee was terminated based entirely on the investigation of the undercover operative.⁴² The investigator did not appear at the hearing nor was he able to be deposed by the union representing the grievant.⁴³ The arbitrator found that the company failed to satisfactorily show "clear and convincing proof" that the employee was using illegal narcotics on the job by relying solely on the operative's report.⁴⁴ The report from the private investigator was hearsay lacking any other evidence or testimony to corroborate it.⁴⁵ Without corroborating evidence to create a factual background for the investigator's findings, the arbitrator said that "little, if any, weight" could be given to it.⁴⁶

Similarly, in *Mason v. Administrator, Ohio Bureau of Employment Services*, the grievant appealed an arbitration award upholding her termination on the grounds that the employer based its decision on hearsay documentary evidence.⁴⁷ The employee had been terminated after an investigation by the employer revealed that she appeared to be falsifying her time sheets.⁴⁸ On appeal to the court, the employee testified under oath that the employer had allowed her to work at home, making up for the discrepancies on the sheets.⁴⁹ The employer challenged the

39. *Id.*

40. *Tarmac Va. v. Teamsters Local 592*, 95 Lab. Arb. Rep. (BNA) 813, 820 (1990) (Gallagher, Arb.).

41. *Id.* at 814.

42. *Id.* at 818.

43. *Id.* at 819.

44. *Id.* at 818.

45. *Id.* at 819.

46. *Id.*

47. *Mason v. Adm'r, Ohio Bureau of Emp't. Servs.*, No. C-990573, 2000 Ohio Ct. App. LEXIS 1524, at *5 (Ohio Ct. App. Apr. 7, 2000).

48. *Id.* at *2.

49. *Id.* at *5.

employee's sworn testimony with their attorney's written summary of the facts from the arbitration hearing that synthesized the description of the time sheets along with the statements of the grievant.⁵⁰ The award of the arbitrator was reversed because the employer's summarization of the documents and testimony could not stand against the sworn statements of the grievant at the court hearing.⁵¹ The Court stated "that to give credibility to 'written statements of a person not subject to cross-examination because he did not appear at the hearing and to deny credibility to the claimant testifying in person makes a mockery of any concept of a fair hearing.'"⁵² Because the attorney's report of the arbitration proceeding was not sworn testimony and was the "self-serving" creation of the employer's attorney, it cannot be given more weight than the sworn testimony of the grievant.⁵³

Greyhound Lines, Inc. v. Amalgamated Transit Union, Local 1700 involved video evidence that was obtained during an investigation and served as a basis for the grievant's discharge.⁵⁴ The grievant was a Greyhound bus driver who was terminated for having a series of disputes with an independent contractor, a bus station owner, who had an agreement with Greyhound to provide transportation services to the company.⁵⁵ During the final incident, the owner's son took a video of the grievant with his cell phone.⁵⁶ This video was used during the investigation and the employer attempted to admit it at the hearing.⁵⁷ The arbitrator found that because the videographer did not testify at the hearing, nor did any of the individuals from the company who were present at the incident, the reliability of the video was questionable.⁵⁸ The arbitrator asserted that the video was like a written statement, and since the creator of it could not be cross-examined, it was inadmissible hearsay.⁵⁹ The grievance was sustained on the basis that there was insufficient evidence to show that there was just cause for the discharge.⁶⁰

50. *Mason v. Adm'r, Ohio Bureau of Emp't. Servs.*, No. C-990573, 2000 Ohio Ct. App. LEXIS 1524, at *6 (Ohio Ct. App. Apr. 7, 2000).

51. *Id.* at *13.

52. *Id.* at *9 (quoting *Shirley v. Adm'r, Ohio Bureau of Emp't. Servs.*, No. C-77431, 1978 Ohio Ct. App. LEXIS 7724, at *5 (Ohio Ct. App. Oct. 11, 1978)).

53. *Id.* at *12.

54. *Greyhound Lines, Inc. v. Amalgamated Transit Union, Local 1700*, 126 Lab. Arb. Rep. (BNA) 1743, 1745 (2009) (Landau, Arb.).

55. *Id.* at 1744-45.

56. *Id.* at 1745.

57. *Id.*

58. *Id.* at 1746.

59. *Id.* at 1747.

60. *Id.* at 1748.

In *Pacific County v. Teamsters Local 252*, the employer used statements and investigative interviews from a key witness to prove at the hearing that the grievant acted inappropriately.⁶¹ The witness's written statements and oral interview answers contradicted each other at critical points, yet the employer did not seek to clarify these inconsistencies.⁶² Instead, the employer interpreted the inconsistencies against the grievant and imposed discipline notwithstanding the confusion.⁶³ At the hearing, the witness did not testify, making the statements and responses to oral questions uncorroborated hearsay.⁶⁴ In contrast, the grievant testified at the hearing and was consistent and adamant regarding his version of the events.⁶⁵ Since the employer did not provide corroborating evidence to the hearsay statements, the arbitrator credited the grievant and found there was no just cause to discipline the grievant.⁶⁶

In this same vein, in *Broward County Sheriff v. Broward County Police Benevolent Association*, the grievant was disciplined because the employer, Broward County Sheriff's Office, alleged that the grievant was the aggressor in a domestic incident.⁶⁷ The grievant testified at the hearing, but the only other witness to the incident, the grievant's girlfriend, with whom he was involved in the altercation, did not testify.⁶⁸ Rather, the employer presented recorded sworn statements from the grievant's girlfriend.⁶⁹ The employer based its decision to discipline the grievant on the girlfriend's version of the events, over the grievant's sworn testimony.⁷⁰ Arbitrator Milinski stated the importance of having the girlfriend testify because she was the only other witness to the incident and the grievant had a right to cross-examine his accuser.⁷¹ Therefore, the girlfriend's recorded statements were given only limited weight.⁷² Arbitrator Milinski noted that the girlfriend's hearsay statements could be used to corroborate the other evidence at the hearing to support the employer's decision to impose discipline.⁷³ However, the arbitrator noted

61. *Pac. Cty. v. Teamsters Local 252*, 132 Lab. Arb. Rep. (BNA) 261, 269 (2013) (Coss, Arb.).

62. *Id.* at 268.

63. *Id.* at 267-68.

64. *Id.* at 269.

65. *Id.* at 267.

66. *Id.* at 271.

67. *Broward Cty. Sheriff v. Broward Cty. Police Benevolent Ass'n*, 131 Lab. Arb. Rep. (BNA) 1428, 1435 (2013) (Milinski, Arb.).

68. *Id.* at 1436.

69. *Id.* at 1435-36.

70. *Id.* at 1433.

71. *Id.* at 1436.

72. *Id.*

73. *Id.*

that the girlfriend's failure to cooperate and her prior arrest for domestic battery diminished the reliability of her statements.⁷⁴ The arbitrator concluded that the other evidence, along with the hearsay statements, were insufficient to find that the grievant was the aggressor in the domestic altercation in the face of the grievant's sworn testimony at the hearing providing a consistent, alternate version of the events.⁷⁵ As a result, the employer did not have just cause to terminate the grievant.⁷⁶

In *Soule Steel Company v. United Steelworkers of America, Local 2018*, the evidence produced from the investigation of employees who inadvertently toppled a scrap yard crane was deemed "hearsay multiplied by conclusions, to the second power."⁷⁷ The final investigatory report had been composed by condensing multiple reports from various investigators.⁷⁸ The lead investigator subsequently drew conclusions based on these reports as to whether the grievants violated company policy, including the other investigators' opinion in the final product.⁷⁹ This final report was deemed improper because it failed to meet the standard of being "created by the witness at a point and time when an event occurred so that it is 'present recollection refreshed' or, if it fails to refresh recollection, that it is 'past recollection recorded.'"⁸⁰ The testimony gathered during the investigation was too far removed from the actual incident that it was not admissible as evidence;⁸¹ it did nothing more than restate what an investigator read into the facts of the case.⁸²

In *City of Albuquerque v. AFSCME, Local 624*, the arbitrator found that allegations that the grievant made threats could not be the basis for grievant's termination because the employer only offered uncorroborated hearsay testimony that the threats were made.⁸³ In *Vectren Energy Delivery of Ohio v. UWUA, Local 175*, the arbitrator sustained the grievance and noted "[w]here there are differing views on the facts, and all that the employer has is written statements versus testimony, it is fair

74. *Broward Cty. Sheriff*, 131 Lab. Arb. Rep. at 1436.

75. *Id.*

76. *Id.* at 1437.

77. *Soule Steel Co. v. United Steelworkers of Am., Local 2018*, 85 Lab. Arb. Rep. (BNA) 336, 342 (1985) (Richman, Arb.).

78. *Id.*

79. *Id.* at 344.

80. *Id.* at 342.

81. *Id.*

82. *Id.*

83. *City of Albuquerque v. AFSCME, Local 624*, 127 Lab. Arb. Rep. (BNA) 475, 477 (2009) (Shieber, Arb.).

to find that testimony is a better measure of the facts.”⁸⁴ Moreover, in *University Hospital, Incorporated v. Ohio Nurses Association*, the arbitrator said that “[w]hile [grievant’s] testimony is suspect, it outweighs mere hearsay testimony from the investigators offering statements by employees who were not called to testify and were not subject to cross-examination [sic].”⁸⁵

B. Corroborated Investigatory Evidence

The weight given to investigatory evidence increases if other evidence corroborative of the investigatory evidence is introduced at the hearing.⁸⁶ In *Dakota County v. Human Services Supervisors Association*, the grievant was a probation officer who was terminated after the employer found she knew that her husband had an operation to grow and sell illegal marijuana on her property.⁸⁷ An investigating officer interviewed the grievant’s son (who had reported the illegal operation) and the husband, but neither testified at the hearing.⁸⁸ Rather, the investigating officer testified to their statements.⁸⁹ In this case, even absent witness testimony, the arbitrator found that there was sufficient corroboration because there was photographic evidence, direct testimony from the investigating officer regarding his first-hand observations, and testimony from the grievant.⁹⁰ As such, the arbitrator denied the grievance, finding that there was just cause to terminate the grievant.⁹¹

In another case, the grievant was discharged for “gross misconduct” based upon an incident in which the machine the grievant was operating struck another piece of machinery “some distance” from where it was located.⁹² The company investigated the matter and took statements from the grievant and other employees privy to the incident, after which it

84. *Vectren Energy Delivery of Ohio v. UWUA, Local 175*, 130 Lab. Arb. Rep. (BNA) 1645, 1654 (2012) (Paolucci, Arb.).

85. *Univ. Hosp., Inc. v. Ohio Nurses Ass’n*, 126 Lab. Arb. Rep. (BNA) 1719, 1722 (2009) (Goldberg, Arb.).

86. See generally *Dakota Cty. v. Human Servs. Supervisors Ass’n*, 131 Lab. Arb. Rep. (BNA) 1776, 1784 n.1, n.3 (2013) (Jacobs, Arb.) (citing incidents of corroborative evidence).

87. *Id.* at 1776-77.

88. *Id.* at 1781-82.

89. *Id.*

90. *Id.* at 1782; see also *Georgia-Pacific v. GMP, Local 235*, 127 Lab. Arb. Rep. (BNA) 270, 272 (2009) (Heekin, Arb.) (finding that the employer did not have just cause to discharge the grievant when the only direct witnesses to the alleged misconduct did not testify and the investigator’s testimony as to what they said to him was insufficient without corroboration).

91. *Dakota Cty.*, 131 Lab. Arb. Rep. at 1784.

92. 2009 AAA LEXIS 216, *1-3 (2009) (Sugerman, Arb.).

concluded that the grievant's act was deliberate.⁹³ The statements were introduced at the hearing, in addition to results of a simulated test that supported the company's conclusion that the incident was not an accident.⁹⁴ In denying the grievance, the arbitrator stated that the investigatory statements were "technically speaking, hearsay. They were, however, submitted as part of a joint exhibit without reservation. Moreover, all hearsay evidence need not be disregarded, especially where it appears to be reliable or where it is used to confirm other facts established through, non-hearsay, evidence."⁹⁵

In *Oroville School District v. Oroville Education Association*, the arbitrator admitted the investigative report to the extent that it was corroborated by witness testimony, notwithstanding evidence that the employer attempted to bias the investigator towards a finding of employee wrongdoing.⁹⁶ While "biased and 'managed' investigations" are usually considered a "fatal procedural flaw" in employee discipline cases,⁹⁷ the arbitrator found no indication of any such bias.⁹⁸ The arbitrator concluded that the investigator testified credibly that he remained objective.⁹⁹

In *Gerdau Ameristeel, Incorporated v. United Steelworkers, Local 8586*, testimony by a majority of witnesses interviewed during an investigation into employee misconduct supported the admission of their statements in the investigative report.¹⁰⁰ The arbitrator denied a grievance where the employer presented written sworn statements from eight witnesses to the misconduct and seven of those witnesses testified at the hearing, while the union only supplied the employee's written statement rather than having him testify at the hearing.¹⁰¹ The direct testimony of

93. 2009 AAA LEXIS 216, *4-6 (2009) (Sugerman, Arb.).

94. *Id.* at *3, 5.

95. *Id.* at *6-7.

96. *Oroville Sch. Dist. v. Oroville Educ. Ass'n*, 132 Lab. Arb. Rep. (BNA) 599, 604 (2013) (Wesman, Arb.).

97. *Id.* at 603.

98. *Id.* at 604.

99. *Id.*

100. *Gerdau Ameristeel, Inc. v. United Steel Workers, Local 8586*, 132 Lab. Arb. Rep. (BNA) 633, 639 (2013) (Hoose, Arb.).

101. *Id.* at 639-40. *Cf.* 2012 AAA Lexis 576 *1, *17-19 (2012) (Milinski, Arb.). In an employment disciplinary case, a first line supervisor was demoted to a rank and file position "because his alleged inappropriate conduct exposed the organization to charges of unlawful sexual harassment and workplace violence." *Id.* at *16-17. One specific allegation against the grievant was that he sexually assaulted an employee at work. *Id.* at *16. The company's case relied on the testimony of the employee alleging the assault, and the grievant denied the allegation. *Id.* at *18. At the hearing, the grievant introduced into evidence the County's Fair Employment Practices Investigation report and the State's Attorney decision not to file charges against the grievant. *Id.* at *18-19. The arbitrator noted that although the investigatory report and State's Attorney decision not to file charges were

the witnesses gave weight to their written statements, whereas the grievant's written statement alone was an insufficient source of information as to the grievant's position.¹⁰²

In another case, the grievant was terminated for not complying with a directive to provide justification for being absent from work.¹⁰³ The evidence indicated that the company had a policy directing employees to provide written justifications where there were "usually issues based on a pattern of sick leave usage and/or usage of sick leave in excess of what is accrued by the employee during a year."¹⁰⁴ The grievant provided the employer with medical slips regarding certain dates that she was absent and the employer investigated the authenticity of the medical slips.¹⁰⁵ At the hearing, a management employee testified as to what she was told by the grievant's doctor and his assistant concerning the grievant's visits or contacts with the doctor or his office on the dates at issue.¹⁰⁶ The management employee also took notes on her investigative findings regarding her conversations with the doctor and his assistant.¹⁰⁷ In addition, the management employee examined the actual medical excuse slips furnished to the employer by the grievant and concluded that the medical slips were falsified by the grievant.¹⁰⁸ Although the arbitrator concluded that the investigator's testimony regarding what he was told by the doctor and his assistant, as well as the investigator's notes themselves were hearsay,¹⁰⁹ the investigator's review of the actual medical slips constituted direct evidence and the hearsay evidence was bolstered by the grievant "acknowledging that she falsified the medical excuse slips" and submitted them to the employer.¹¹⁰

C. Reliance on Investigatory Evidence Without Corroborative Evidence

There are a limited number of cases that illustrate the circumstances under which an arbitrator would give substantive value to hearsay

both hearsay, "both offer corroborating support that there was insufficient evidence to prove the sex assault occurred." *Id.*

102. See *Gerdau Ameristeel, Inc.*, 132 Lab. Arb. Rep., at 639.

103. 2014 AAA LEXIS 52 *1, 22-23 (2014) (Feinberg, Arb.).

104. *Id.* at 40-41.

105. *Id.* at 10-12.

106. *Id.* at 21, 41.

107. *Id.* at 41-42.

108. *Id.* at 11-12.

109. *Id.* at 41-42.

110. *Id.* at 42.

evidence despite little to no corroborating evidence, and these cases typically turn on the union's control over the witness.¹¹¹ In *Allied Waste Services of Evansville v. Teamsters, Local 215*, the grievant was discharged for failing to report an accident in a timely manner.¹¹² The employer interviewed the grievant and two other employees as part of the investigation, which found that there were substantive differences between the grievant's account of the alleged accident and the other employees' accounts.¹¹³ Although the grievant testified at the hearing, the two employees whose version of the incident differed from the grievant's did not testify; in addition, the investigator testified as to what he was told by the two employees.¹¹⁴ Arbitrator Cohen found that the investigator's testimony as to what he was told by the two was sufficient¹¹⁵ and stated in his decision, "[the investigator's] testimony is admissible, not because it is evidence of proof of the truth of the information provided by [the employees] to him; but the information has a bearing on the reasonable and good faith effort by [the investigator] to find answers to the incident involving the Grievant."¹¹⁶ "In addition, the information has an effect on [the investigator] and the actions taken by him."¹¹⁷ The arbitrator further found that the statements by the employees constituted "utterances and conduct which constitute an intimate relation to the events referred to by the Grievant," and therefore the statements "constitute[d] an exception to the hearsay rule."¹¹⁸

In *Express Scripts, Incorporated v. UFCW, Local 1564*, the arbitrator credited multiple complaints against the grievant to support a finding of just cause, despite the fact that the complainants did not testify.¹¹⁹ The only corroborating evidence the arbitrator noted was the documentation of those complaints and direct testimony from the Human Resources manager, who testified that she was aware of the grievant's alleged problematic behavior.¹²⁰ Although there was no corroborating evidence of the actual misconduct, the arbitrator concluded that the evidence of the

111. See *Allied Waste Serv. of Evansville v. Teamsters, Local Union No. 215*, 128 Lab. Arb. Rep. (BNA) 250, 254 (2010) (Cohen, Arb.).

112. *Id.* at 251-52.

113. *Id.* at 252.

114. *Id.* at 254-55.

115. *Id.* at 254.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Express Scripts, Inc., v. UFCW, Local 1564*, 132 Lab. Arb. Rep. (BNA) 810, 813, 816 (2013) (Nicholas, Arb.).

120. *Id.* at 816.

complaints and the testimony from the Human Resources manager “establishe[d] a true preponderance of the evidence, conveying that at the time of the Grievant’s termination, the Grievant’s inappropriate behavior was no longer tolerable.”¹²¹

Similarly, in *U.S. Steel Corporation v. United Steelworkers, Local 1014*, the arbitrator considered interview notes of the investigating manager and employees’ written statements even though the employees and persons interviewed did not testify at the hearing.¹²² The grievant was terminated for harassment after an extensive investigation, notwithstanding that the employees interviewed who alleged the harassment could not be called by the employer to testify at the hearing because a provision in the collective bargaining agreement expressly prohibited the employer from subpoenaing or calling as a witness any bargaining unit employee.¹²³

Instead, an investigator testified to the interviews she had with the employees.¹²⁴ The arbitrator noted that the employees did not have any motivation to falsify their accounts and credited their statements to the investigator, thereby finding just cause.¹²⁵ In another case decided by the same arbitrator, involving the same employer, using the same collective bargaining agreement, and a similar fact pattern, the arbitrator made further comments on the basis for his reasoning in these types of cases.¹²⁶ He noted that even though the employer could not call the bargaining unit employees to testify, the union could have called the bargaining unit employees to testify on the grievant’s behalf, but it declined to do so, thus failing to corroborate the employee’s defense to his termination.¹²⁷ In addition, the employer presented the best evidence it could, relying on the investigator’s recollection of the interviews with the complaining employees.¹²⁸

121. *Express Scripts, Inc.*, 132 Lab. Arb. Rep. at 816.

122. *U.S. Steel Corp. v. United Steelworkers, Local 1014*, 127 Lab. Arb. Rep. (BNA) 1127, 1131-32 (2010) (Petersen, Arb.).

123. *Id.* at 1132.

124. *Id.*

125. *Id.*

126. *U.S. Steel Corp. v. United Steelworkers, Local 1299*, 126 Lab. Arb. Rep. (BNA) 513, 517 (2009) (Petersen, Arb.).

127. *Id.*

128. *Id.*

II. POLICE REPORTS AS HEARSAY

A. *Admissibility of Police Reports at Hearing*

Police reports are sometimes implicated as part of an employer's investigation.¹²⁹ Although the police report typically includes information that would be viewed as hearsay, the report itself is generally received into evidence by the arbitrator on the grounds that it constitutes a business record,¹³⁰ that it is evidence that the employer conducted a full and fair investigation under the principle of just cause,¹³¹ or to show that the employer was on notice of some fact relevant to the case.¹³² However, the fact that the report is admitted into evidence does not reflect the weight that an arbitrator will assign to the evidence contained in the report in arriving at a decision.¹³³ One factor that the arbitrator will consider in determining the weight to give the report is whether the report's author testifies at hearing and therefore is subject to cross-examination.¹³⁴

B. *Police Report Admitted but Inadequate to Constitute Just Cause*

In one case,¹³⁵ the employer, a college, discharged the grievant based upon the grievant's arrest on drug charges, the contents of the police report related to the arrest, the criminal charges related to the arrest, and the statements of the grievant.¹³⁶ Although the arbitrator found that the "[p]olice documents themselves are not hearsay by the reporting officer

129. 2011 AAA LEXIS 701, *1, 2 (2011) (Steinberg-Brent, Arb.).

130. *Id.* at 16. The arbitrator received a police report into evidence "as an official record kept in the ordinary course of police business." *Id.* However, she rejected an accident reconstruction report prepared by an independent company because it was not an official record and the preparer of the report did not testify. *Id.* at 9-10.

131. *Id.* at 10-11.

132. See 2010 AAA LEXIS 800, *1, 14 (2010) (Lenahan, Arb.) ("While the police report is admissible to establish that an arrest was made and charges filed, it cannot be used to establish that the Grievant was under the influence at the time of his arrest.").

133. See 1 STEVEN M. WOLF, LABOR AND EMPLOYMENT ARBITRATION § 5.07, LexisNexis (database last updated 2020) ("Parties should be keenly aware that, when hearsay is in the record and constitutes a critical element in the disposition of the grievance, the arbitrator will be extremely circumspect before assigning significant weight to such evidence.").

134. 2008 AAA LEXIS 1030 *1, 27 (2008) (Stutz, Arb.); 2010 AAA LEXIS 800, *1, 14-15 (2008) (Lenahan, Arb.) ("Certainly, testimony by the arresting officer or someone who observed the Grievant at the time of his arrest would be helpful in determining whether the Grievant was under the influence. No such testimony exists here.").

135. 149155-AAA, 2012 Lab. Arb. Rep. Supp. (BNA) 149155 (2012) (Ryan, Arb.).

136. *Id.*

because the document qualifies under an exception to the hearsay rule,” he concluded that “the contents of the report in the key areas cited by the College are each either single or double hearsay and not sufficiently reliable to establish proof of misconduct.”¹³⁷ Therefore, the arbitrator concluded that the college did not have just cause to terminate the grievant.¹³⁸

In another case, the employer discharged an employee based on accusations from information in a police report.¹³⁹ The employer cited the police report as the basis for deciding to discharge the grievant, and attempted to admit the report into evidence.¹⁴⁰ The employer argued “that the evidence included in the Police report, although circumstantial in nature, establishes that Grievant was drinking alcohol and intoxicated.”¹⁴¹ The employer did not present any witnesses at the hearing nor did it provide testimony from the arresting officers, instead relying solely on the police report.¹⁴² The union argued that the police report used to establish the accusations leading to the grievant’s discharge was based on hearsay.¹⁴³ The arbitrator agreed with the union’s argument, concluding that “the Board properly cannot find [grievant] was using alcohol based on the hearsay statements included in the Police report.”¹⁴⁴ He went on to state, “[t]here simply is no way for the Board to evaluate those statements, at least one of which was given by a patron who acknowledged he himself was ‘buzzed.’”¹⁴⁵

Another case involved a grievant who was discharged for misuse of a university copy room.¹⁴⁶ According to the grievant’s supervisor, around Saint Patrick’s Day, green paper was found in the copy machine that had not been placed there by copy center staff.¹⁴⁷ According to the staff at the copy center, the value of copy supplies and paper that had been used by this unknown intruder exceeded \$1,000.¹⁴⁸ Following this instance, the employer called campus police who installed two surveillance cameras to

137. 149155-AAA, 2012 Lab. Arb. Rep. Supp. (BNA) 149155 (2012) (Ryan, Arb.).

138. *Id.*

139. *See* U.S. Steel Corp. v. United Steelworkers, Local 1899, 128 Lab. Arb. Rep. (BNA) 1308, 1313 (2010) (Das, Arb.).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1313-14.

144. *Id.* at 1315.

145. *Id.*

146. *See* 162333-AAA, 2010 Lab. Arb. Rep. Supp. (BNA) 162333 (2010) (Daly, Arb.).

147. *Id.*

148. *Id.*

identify who was using the equipment.¹⁴⁹ Subsequently, video surveillance revealed that grievant entered the copy room and used the machine for 15 to 20 minutes.¹⁵⁰ The grievant testified that he had used the copier to make six to eight copies of DVD labels of the movie “Twilight” for his granddaughter and her friends.¹⁵¹ At the hearing, the employer introduced the campus police investigation report to support its decision to discharge.¹⁵² The arbitrator stated:

the “results of the campus police investigation” are cited as an additional foundation for the discharge; but to the extent that investigation resulted only in an *assumption* that [the grievant] was guilty of far more than has been proven by the evidence, it cannot serve as a legitimate basis for his discipline.¹⁵³

In a case where the grievant was discharged for allegedly operating a company car while intoxicated, the employer introduced the police report into evidence to prove that the grievant was intoxicated when he was arrested.¹⁵⁴ The arbitrator concluded that “the [employer] failed to prove that the [g]rievant was intoxicated or under the influence,” and instead only proved that the grievant had been arrested on the night of the incident.¹⁵⁵ The employer attempted to rely on a statement made by the arresting officer that the “[g]rievant was ‘manifestly under the influence of alcoholic beverages,’” but the arbitrator found the statement to be hearsay that did not fit under an exception.¹⁵⁶ The arbitrator stated that “[a]lthough hearsay is frequently admitted at arbitration hearings, it is insufficient to uphold the termination here. It has been held that where an employer relies solely on hearsay evidence in a case where it has the burden of proof it is insufficient to sustain its case.”¹⁵⁷

In the Matter of Arbitration between *Gaylord Container Corporation v. United Paperworkers, Local 654*, the grievant was terminated for

149. 162333-AAA, 2010 Lab. Arb. Rep. Supp. (BNA) 162333 (2010) (Daly, Arb.).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See* Comm. Workers of Am. Union, 2010 Lab. Arb. Rep. Supp. (BNA) 162089 (2010) (Lenahan, Arb.).

155. *Id.*

156. *Id.*

157. *Id.* at 45.

allegedly threatening his supervisor's life, and the employer introduced into evidence a police report of the alleged threat.¹⁵⁸ The arbitrator stated:

The police report is the kind of evidence which has been called "hearsay within hearsay." Not only is the report itself hearsay because [the reporting officer] did not appear to testify about it in person, but the content of the report is based entirely on what [the victim] said had happened rather than anything [the police officer] saw or heard himself. Needless to say, it is the kind of evidence which many arbitrators would totally exclude, not even allowing it "for what it is worth."¹⁵⁹

The arbitrator ruled that the employer's evidence did not meet the burden of proof, as it did not "provide the 'clear and convincing evidence' needed to prove that [the grievant] threatened to kill [his supervisor]."¹⁶⁰

C. Police Report Admitted and Relied Upon

When a police report is relied upon by an arbitrator, typically the report is admitted in addition to other evidence.¹⁶¹ For example, in a case where an employee was discharged for being at fault in a seven-car accident,¹⁶² the employer introduced the police report to show that the police determined that the grievant was at fault for the accident in order to corroborate the employer's understanding of the incident.¹⁶³ The arbitrator deemed the police report relevant to the case and noted that the employer did not rely solely on the report to make its disciplinary determination.¹⁶⁴ He noted that the employer also relied on a video that provided adequate evidence that the grievant was at fault for the accident.¹⁶⁵ The arbitrator noted that the employer "reviewed the police report, but contrary to the Union's assertion, he did not solely rely on it.

158. *Gaylord Container Corp. Monroe Bag Plant v. United Paperworkers Int'l Union Local 654*, 1992 Lab. Arb. Rep. Supp. (BNA) 106837 (1992) (Hooper, Arb.).

159. *Id.*

160. *Id.*

161. *See ATU, Local, 2013 Lab. Arb. Rep. Supp. (BNA) 150448 (2013) (Buckalew, Arb.)* ("Our investigation of the accident has included a review of the video from the surveillance system, the T_Police investigation and police report and the Department of P_inspection of the bus.").

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

The strongest evidence is the video, and it establishes that [the grievant] was improperly operating the vehicle at the time of the accident.”¹⁶⁶

In another case where the employer discovered child pornography on the employee’s workplace computer,¹⁶⁷ the employer first contacted the local police department, which took the computer into police custody.¹⁶⁸ The computer was then transferred to the state police, which conducted a forensic examination on the grievant’s computer, and subsequently returned the computer to the local police along with a report detailing the findings of the forensic examination.¹⁶⁹ The police report detailing the findings of the forensic examination “could not exclude inadvertent access as the reason for the presence of illicit material.”¹⁷⁰ The author of the report did not testify.¹⁷¹ Rather, a local police officer involved in the investigation testified on summarizing the state police findings, which echoed the union’s theory that the illicit material on the computer could have been due to inadvertent access.¹⁷² In light of the finding of the police report, the union attempted to use the findings of the state police without the author of the report being present at the hearing and subject to cross-examination.¹⁷³ Despite the employer requesting the police review of its employee’s workplace computer, it objected to the arbitrator relying upon the findings of the report on the grounds that it was hearsay.¹⁷⁴ The arbitrator was unpersuaded by the employer’s hearsay argument and instead focused on the fact that “police personnel who inspected the computer were unable to conclude that the Grievant was guilty of misconduct.”¹⁷⁵

In *Greater Cleveland Regional Transit Authority v. Amalgamated Transit Union, Local 268*, a city bus driver was discharged for hitting a pedestrian in what was deemed a “preventable accident.”¹⁷⁶ After the accident, both the Transit Authority’s Safety Department and the Transit

166. ATU, Local, 2013 Lab. Arb. Rep. Supp. (BNA) 150448 (2013) (Buckalew, Arb.).

167. See *AK Steel-Butler Works v. UAW, Local 3303*, 125 Lab. Arb. Rep. (BNA) 903, 904 (2008) (Dean, Arb.).

168. *Id.* at 909.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 909-10.

174. *Id.* at 909. The arbitrator said that the Employer had introduced the police report into evidence and did not object during the hearing to a union witness reciting conclusions of the report during his testimony. *Id.*

175. *Id.* at 911.

176. *Greater Cleveland Reg’l Transit Auth. v. Amalgamated Transit Union, Local 268*, 2006 Lab. Arb. Rep. Supp. 117639, 53 (2006) (Cohen, Arb.).

Police “arrived at the scene, and interviewed witnesses, took photographs, and prepared written reports on the accident.”¹⁷⁷ The Transit Police also obtained two written statements from witnesses who observed the accident.¹⁷⁸ The arbitrator accepted the Transit Police report that included the statements of the two witnesses.¹⁷⁹ The arbitrator relied upon these statements despite the fact that the witnesses did not provide testimony at the hearing.¹⁸⁰ Arbitrator Cohen reasoned,

[t]heir handwritten accounts of the June 8 accident, however, are highly credible and have been given great weight. I have concluded that the written accounts of the two (2) witnesses are part of a Transit Police report of an official investigation of the accident, which constitutes an exception to the hearsay rule and are admissible.¹⁸¹

Relying upon the evidence, the arbitrator concluded that the employee was properly terminated.¹⁸²

In yet another case where the grievant was discharged for driving under the influence while operating a company vehicle, the arbitrator relied upon witness statements included in a police report.¹⁸³ In this case the grievant was operating a company car when he was pulled over by a police officer for failing to use proper turn signals.¹⁸⁴ The officer told the grievant that he smelled alcohol and promptly took the grievant to the police station and conducted a Breathalyzer test.¹⁸⁵ The test revealed that the grievant’s blood alcohol count was twice the legal limit.¹⁸⁶ During the hearing, the employer introduced into evidence the results of the Breathalyzer test, the police report, and statements made by the grievant admitting that he had consumed six beers prior to operating the vehicle.¹⁸⁷ This combination of evidence was enough for the arbitrator to find that

177. Greater Cleveland Reg’l Transit Auth. v. Amalgamated Transit Union, Local 268, 2006 Lab. Arb. Rep. Supp. 117639, 53 (2006) (Cohen, Arb.).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See RSC Equipment Rental v. IUOE, Local 150, 2005 Lab. Arb. Rep. Supp. (BNA) 119411 (2005) (Bierig, Arb.).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

the employer had just cause to terminate the grievant.¹⁸⁸ The arbitrator noted,

[t]he police officer's report, the interview with Banks and Godwin, and Grievant's inconsistent versions of the events in question reasonably led to the conclusion that Grievant had committed a DUI in the early morning hours of October 16, 2004. While I agree that the police report was technically hearsay, it was sufficiently reliable and corroborative of the other evidence to reasonably rely upon.¹⁸⁹

CONCLUSION

Arbitrators are not bound by the rules of evidence that are applicable to proceedings in courts of law, and thus are not constrained by the general rule against the admissibility of hearsay evidence.¹⁹⁰ Although arbitrators have great leeway when it comes to admitting hearsay – such as employer investigatory reports¹⁹¹ and police reports¹⁹² – they should be wary of crossing the boundaries that have been established by institutional practice. In arbitration cases, the authors believe that if the employer can but does not produce non-hearsay evidence in support of the discipline imposed, such hearsay is not sufficient to establish just cause for such discipline.¹⁹³ Arbitrators must be careful to balance the efficiency of the hearing proceedings that seek to obtain optimal relevant information, while at the same time upholding the integrity of the arbitration process.

188. RSC Equipment Rental v. IUOE, Local 150, 2005 Lab. Arb. Rep. Supp. (BNA) 119411 (2005) (Bierig, Arb.).

189. *Id.*

190. *See supra* Introduction.

191. *See supra* Section I.

192. *See supra* Section II.

193. *See supra* Section I.