Arbitral Views of Fighting: An Analysis of Arbitration Cases, 1989-2003

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ABSTRACT

Workplace violence receives extensive media coverage, often focusing on extreme cases of mass killings and shootings. Fighting, including name calling, invasion of personal space, pushing, kicking, spitting, etcetera, has long been present in the workplace. Fights result in disciplinary action and subsequent grievances carried through to arbitration. Fight-related arbitration decisions from 1989-2003 as published by the Bureau of National Affairs, Inc. are reviewed. Study issues concern circumstances and context surrounding fights including presence of provocative factors, nature of the incident, weapons involved, existence of continuing bad blood and other factors as suggested by Arbitrator Volz in a seminal 1966 decision.

Keywords: arbitration, grievance, workplace violence, fighting, labor-management relations

INTRODUCTION

Popular Media

Mass killings. Shooting sprees. Brutal beatings. Each of these acts creates attention grabbing headlines receiving coverage throughout the popular media. Major workplace violence cases seen in newspapers and publications across the United States often focus on these major incidents; fighting in the workplace usually is not as sensational as the headlines. More widely remembered, for example, is the decade defining occurrences of the postal service shooting sprees in the late 1980s to mid 1990s and the subsequent phrase, "Going postal!"

Time Magazine reported on September 1, 1986: A former Marine, postal worker Patrick Sherrill, methodically shot 21 of his fellow workers leaving 14 dead and seven wounded, before killing himself. Sherrill, 44, began the massacre without warning as he arrived for work at 7:00 a.m. carrying a mail bag stuffed with ammunition and three pistols. The shooting spree ended at approximately 8:30 a.m. Sherrill had been warned in the previous days to improve his work or face dismissal. Police estimated that 50-75 workers were present in the building at the time of the shooting. One worker said that he had to play dead, lying among four dead co-workers, in order to escape with his life (Lamar, 1986).

The *San Diego Union-Tribune* reported in September 2004 that a busboy at a TGI Friday's stabbed another in the back with a butcher knife as they argued over who was supposed to clean up after a large party. The attack occurred in the busy restaurant in Carlsbad, California at approximately 7:00 p.m. One of the men grabbed a butcher knife and plunged it into the back of the other man. The victim was treated and released from the hospital (San Diego Union Tribune, 2004).

CNN reported on July 11, 2000 that Thomas Junta, 42, of Reading, Massachusetts beat Michael Costin, 40, of nearby Lynnfield, MA, unconscious at the Burbank Ice Arena. Costin had been on the ice with a group of youngsters, all age 10, including his three sons and Junta's son. The hockey game was supposed to be non-contact, but Junta got agitated when things got rougher and some of the players engaged in checking. Junta and Costin began arguing with one another on the rink and then moved into a locker room. A rink manager threw Junta out, but he returned, confronting Costin in the rink's lobby. Junta knocked Costin to the floor and punched him in the head repeatedly. Costin was knocked unconscious and died at the hospital. ("Mourners attend funeral" 2000) Thomas Junta was later fired from his job. His employer claimed that his employees had a validated fear that Junta could possibly kill again. The case was taken to arbitration by Junta's representatives (CNN.com, 2000 and Chandler, 2000).

Our society's ideas and notions of violence in the workplace have been fashioned by the popular media's coverage of brutal incidents. Although the hockey killing, cited above, led to an arbitration case considered within this research, in many situations, workplace violence does not involve guns and shooting sprees, but pushing and name calling. These more mundane cases of the everyday working world are typical of those that reach arbitration. The situations and parameters of these routine

occurrences have shaped the guidelines and assessment of workplace violence arbitration cases.

Background

"Increasingly, employers cite the requirements of the Occupational Safety and Health Act's 'general duty' clause to support the implementation and enforcement of zero-tolerance policies against workplace violence"(Rubin, 2003). As one arbitrator wrote, "Employers may be cited by OSHA, under its General Duty Clause, for not providing a safe and healthful work environment, if the employer does not take feasible steps to prevent or abate a recognized violence hazard (Baroni, 1998).

Arbitrator Professor Marvin Volz discussed the factors that should be considered in fighting cases in his 1966 decision in Harshaw Chemical Co.,

> Among the factors which must be weighed and considered in a case involving fighting are: the length of employment of the Grievant and his over-all work record; whether his misconduct consisted of a single unpremeditated blow or a series of deliberate acts; whether a dangerous instrumentality was used; whether the blow was struck with the clenched fist or with an open hand; whether the fight was an unusual "spur-of-the-moment" affair or the result of continuing bad blood between the participants; the severity and duration of the fight; the place of combat; the effect of the breach of shop etiquette upon the morale, safety, and the work habits of other employees; whether the fight is between two employees or between an employee and a member of supervision; the degree of anger exhibited; whether a reasonable and prudent employee would have been inclined to react in a similar manner; whether the event is closed or is likely to be repeated; the presence of mitigating circumstances, such as provocation and discrimination; whether the misconduct evinces a dangerous propensity, a vicious tendency, or a serious emotional instability in the employee indicating a poor industrial risk; whether the misconduct will lead to refusal, reluctance or inability of other employees to work with him; and the adoption of disciplinary action to fit the severity of the offense (Volz, 1966).

STUDY METHODOLOGY

This study reviews discipline as imposed and at arbitral outcome between the public and private unionized sectors. What penalties were upheld, modified or overturned? Sixty-six public sector and 151 private sector cases are reviewed as published by the Bureau of National Affairs, Inc. from 1989-2003. By using two criteria, cases were identified for inclusion. First, BNA's online database was searched using the following classifications: 118.640 (assault; fighting; troublemaking; name calling; profanity; obscene language or other misconduct; harassment); 118.6523 (assault on, offensive language, or other misconduct toward management personnel); and, for public employees, 100.552510 (assaults; fighting; troublemaking; harassment; obscene language or conduct; horseplay; discriminatory treatment). Cases under these

classifications then were individually reviewed to determine if they dealt with discipline applied due to some form of fighting.

Cases were coded in several ways: employment sector, grievant's seniority, discipline imposed by management, discipline outcome at arbitration, whether a fighting/violence policy was in place, whether anger management was ordered by management or arbitrator, premeditation, existence of "bad blood," severity, whether a dangerous weapon/implement was involved, whether blows were struck or attempted with fists or open hands, fight location and timing, who was involved, any mitigations, and whether the incident led to a continuing refusal by coworkers to work with the grievant.

OVERVIEW OF CASES

Each case is classified according to one of seven severity levels: making or attempting multiple blows, making or attempting a single blow, grabbing/shoving, spitting/bodily fluids, invading personal space, threatening, and name calling/profanity. In cases involving multiple severity levels, the most severe level was coded.

Table 1. Cases by Severity and Employment Sector

	Public		Private		Aggregate	
Multiple blows	15.15%	10	16.56%	25	16.13%	35
Single blow	16.67%	11	13.91%	21	14.75%	32
Grabbing/shoving	33.33%	22	12.58%	19	18.89%	41
Invading personal space	13.64%	9	9.27%	14	10.60%	23
Threatening	7.58%	5	29.80%	45	23.04%	50
Name calling/Profanity	13.64%	9	16.56%	25	15.67%	34
Spitting/Bodily Fluids	0.00%	0	1.32%	2	0.92%	2
Total		66		151		217

Table 1 provides the overall distribution of cases by severity within each employment sector and in aggregate; percentages are column-based. Although no conclusions are necessarily to be drawn from the above, it is noteworthy that as a percentage of cases within each sector at each level of severity there seems to be rough comparability, with two exceptions. First, grabbing/shoving represents one-third of public sector cases but less than 13 percent of private sector cases. Secondly, threatening represents just seven and one-half percent of public sector cases but nearly 30 percent of private sector cases. Spitting/bodily fluids only accounted for two cases overall, one of which involved spitting and the other throwing urine.

The summaries of all 217 arbitration cases included in this study are available at the University of Louisville Labor-Management Center's website, www.louisville.edu/labormanagement, under the 'Research' link. The following section gives a sample of the various fighting cases covered in this study.

CASE SUMMARIES

Public Sector Cases

In a 1993 case, a police officer was suspended for threatening a construction worker. The grievant was directing traffic at a construction site when a construction worker became angry at being instructed what to do. The construction worker became so agitated that he assumed a fighting stance. The grievant walked away from the worker, but continued to give instructions about traffic-flow issues. The worker refused to listen to the grievant and stopped traffic flow with his work vehicle. The worker was driving a 10-ton roller and continued to drive toward the grievant, refusing to stop when directed to do so and forcing the grievant backward into traffic. The grievant drew his gun on the worker. The worker stopped the roller and the grievant holstered his gun. The arbitrator found that the grievant should not have drawn his gun, but otherwise acted in a prudent manner. Further, the police department did not have adequate training on when to pull a gun and it was part of the culture to do so more often than warranted. The arbitrator ruled that a suspension was too harsh, but that some discipline was necessary. The suspension was reduced to a written warning and the grievant was required to attend classroom training (Stewart, 1993).

Discharge was overturned in a 1997 case involving two corrections officers. The grievant denied a fight occurred at all, but his co-worker maintained that the grievant had grabbed him from behind, pushed him to the floor, and repeatedly hit and kicked him. The grievant stated that the co-worker shouted and threw himself to the floor, then claimed being attacked by the grievant. The arbitrator concluded that the grievant had been set up and no fight had occurred. As a result, the discharge was overturned (Bowers, 1997).

In a 2000 case, a striking auto-worker was discharged for harassing non-striking workers. The grievant threw a cup of urine into the car of two non-striking workers. The urine got in the eyes and mouth of one co-worker and on the clothes of both workers in the car. In addition, the grievant had threatened non-strikers by saying things such as “you’re going to die” and “I’m going to get you.” The arbitrator ruled that the grievant was discharged with just cause (Shieber, 2000).

A border patrol officer was suspended for disrupting the workplace in a 2001 case. The grievant was president of the local Union and often worked in a Union capacity dealing with grievances and other issues. The grievant was waiting to talk to a worker when a supervisor entered the room. The supervisor engaged the grievant in a conversation that became louder and louder as the supervisor became angrier. The supervisor ordered the grievant to leave the building and the grievant refused, stating that he was off-duty, not in uniform and did not have to take orders. The supervisor then asked the grievant to leave the room and go to an empty office to do his Union business. The grievant complied. The arbitrator found that the supervisor had a dislike for the grievant based on his Union affiliation. This led to the heated argument between the two that the arbitrator found to be the fault of the supervisor. Further, the grievant was acting as a representative of the Union and the supervisor did not have jurisdiction over the grievant at that time. If the supervisor had a problem, he should have filed a complaint with the Union, rather than attempt to discipline the grievant. The arbitrator

ruled that the suspension was not for just cause and ordered that it be removed. (Goodstein, 2001).

Private Sector Cases

In 1993, an employee of a steel company was discharged for throwing a brick at a supervisor. During a meeting with a supervisor, the grievant became angry and left the meeting to go to the dispensary making complaints of asthma. While waiting to go to the dispensary, the grievant threw a brick at the supervisor's car and damaged the windshield. The grievant then went back inside, threw coffee at his supervisor, and then left to wait for a truck to take him to the dispensary. As he was headed to the truck, his supervisor walked out of the building and the grievant threw a brick at him, narrowly missing. The arbitrator found the company fully justified in discharging the grievant and ruled that the grievant did not have good reason to claim health issues or being provoked as reasons for his behavior (Strongin, 1993).

An operator at a steel mill was discharged following a fist fight with a co-worker in a 1995 case. For several years, the grievant had preached his religious beliefs to co-workers while on the job, made religious statements over the intercom, and confronted co-workers when he did not like their language, behavior or religious choices. This resulted in a number of complaints and ongoing tensions with many of his co-workers who did not like being told what to do or having their personal beliefs questioned. On the day of the incident, the grievant admonished a co-worker over the loud speaker after the co-worker had used expletives. Later in the day, the grievant came up behind his co-worker and began hitting him. A fight ensued in which the co-worker sustained injuries that kept him out-of-work, and the grievant received no injuries. The arbitrator found that although his co-worker may have purposely goaded him by using expletives that he knew the grievant would dislike, the grievant was responsible for the fight that occurred. The arbitrator further ruled that the grievant was an "undesirable" employee over all and the grievance was denied (Witt, 1995a).

In a 1997 case, a forklift operator was discharged for threatening a supervisor. The grievant and his supervisor had a tense conversation with the grievant finally stating to his supervisor that he was not scared of him and the supervisor could not tell him what to do. Later in the day, the grievant approached his supervisor about an equipment problem. The supervisor was sarcastic and unhelpful and the grievant reacted by getting off his forklift, getting up in his supervisor's face, and returning to the forklift stating "one of these days." The grievant then drove the forklift away at top speed, came to an "emergency" stop, and drove backward at full speed toward his supervisor. The grievant then stated, "I'm going to get you one of these days outside the plant." The arbitrator found a number of discrepancies and inaccuracies in the Management and Union accounts of the incidents. The company failed to prove that the grievant threatened his supervisor verbally or with a forklift. The grievance was sustained and the grievant reinstated. (Brookins, 1997).

An employee at a distribution warehouse was discharged for fighting with a supervisor. The grievant was angry about a job assignment and had a verbal disagreement with his supervisor. Later in the day, someone made fun of the supervisor over the intercom and the supervisor confronted the grievant, believing it to be him. The

grievant's supervisor put his finger in the grievant's face and the grievant returned the gesture. The supervisor then punched the grievant, knocking him to the ground, followed by a kick in the face. The arbitrator found that there was no evidence that any announcement had been made over the intercom. In addition, all of the evidence pointed to the supervisor as being the aggressor in the fight and that the grievant did not fight back. Initially, the grievant may have been angered by his work assignment, but he did the job as asked and created no further problem. The grievance was sustained and the grievant reinstated (Felice, 1998).

A worker at an auto factory, in a 2000 case, was discharged for insubordination and inappropriate behavior. The grievant asked to leave work because her sister-in-law had been hit by a car. The grievant needed to pick up her mother-in-law and take her to the hospital. The grievant then needed to return home to be with her children who had previously been under the care of her mother-in-law. The grievant's supervisor was busy at the time and indicated that he would get back to her. When her supervisor did not immediately get back to her, the grievant decided she had to leave anyway. The next day she reported for work and was told she had been discharged. The grievant became very upset, using profanities and allegedly threatening remarks. She eventually physically had to be restrained. The arbitrator stated that the grievant's actions must be viewed in light of the circumstances and that her decision to leave work was not outright insubordination. The grievant should have realized there may be consequences for her actions, but had no idea that discharge would be the consequence. The arbitrator ruled that the discharge was without just cause and that the grievant should be reinstated, but without backpay because her behavior at the discharge hearing warranted discipline (Brodsky, 2000).

In a 2000 case, which received extensive media coverage and mentioned earlier in the introduction, an employee at a food distribution hub was suspended indefinitely because of a fight at a children's hockey game. The altercation resulted in the death of the person with whom he was fighting. The grievant claimed self-defense in the criminal case that had not been determined at the time of the arbitration hearing. The company suspended the grievant on the grounds that they did not want an employee that would be a danger to co-workers or damage company reputation. The arbitrator found that, although the grievant's actions led to a "most serious result," they were off-duty and not company related. He further found that this had not harmed company business and there was no showing that the grievant posed a safety hazard. The grievance was sustained and the grievant reinstated (Chandler, 2000).

OVERALL REVIEW OF DISCIPLINE IMPOSED AND ARBITRAL OUTCOME

Table 2. Discipline Imposed by Management—All Cases

	Public		Private		Aggregate	
Discharge	46.97%	31	88.08%	133	75.58%	164
Suspension	48.48%	32	11.26%	17	22.58%	49
Other	4.55%	3	0.66%	1	1.84%	4
Total		66		151		217

Within the public sector, discharge and suspension were imposed by management with comparable frequency. In the private sector, however, discharge was imposed in nearly 90 percent of cases reviewed. “Other” disciplines included one demotion and three written warnings/reprimands. The prevalence of discharge within the private sector is not explained by a prevalence of greater severity incidents. However, the lesser use of discharge in the public sector may be a partial result of cases involving law enforcement officers, corrections officers and others for which physical and other altercations may be more likely and necessary.

Table 3. Arbitral Outcome of Discipline—All Cases

	Public		Private		Aggregate	
Upheld	33.33%	22	41.72%	63	39.17%	85
Modified	43.94%	29	45.70%	69	45.16%	98
Overturned	22.73%	15	12.58%	19	15.67%	34
Total		66		151		217

Overall, 33 percent of public sector and 42 percent of private sector cases resulted in discipline being upheld. However, public sector cases saw nearly twice the percentage of overturned discipline (23 percent) than the private sector (12.6 percent).

Table 4. Arbitral Outcome of Discipline—Non-discharge Cases

	Public		Private		Aggregate	
Upheld	31.43%	11	44.44%	8	35.85%	19
Modified	40.00%	14	50.00%	9	43.40%	23
Overturned	28.57%	10	5.56%	1	20.75%	11
Total		35		18		53

Table 5. Arbitral Outcome of Discipline—Discharge Cases

	Public		Private		Aggregate	
Upheld	35.48%	11	41.35%	55	40.24%	66
Modified	48.39%	15	45.11%	60	45.73%	75
Overturned	16.13%	5	13.53%	18	14.02%	23
Total		31		133		164

When considering non-discharge- (Table 4) and discharge-related cases (Table 5) separately, contrasting results are presented. In the public sector, non-discharge-related cases represent 35 of 66 cases reviewed. In contrast, the number of private sector cases is dramatically reduced from 151 to 18 when removing discharge cases—making any meaningful analysis difficult. However, within the 35 non-discharge public sector cases discipline was upheld in nearly 31.5 percent of cases; but over 35 percent of public sector discharges were upheld. In the private sector non-discharge discipline and discharge were upheld in a comparable percentage of cases (41 percent and 44

percent, respectively). There is an over eight percentage point increase in disciplinary modifications for non-discharge as compared to discharge cases in the public sector.

Perhaps more importantly, Tables 3, 4 and 5 suggest that arbitration is a "good bet" for grievants whether facing discharge or other discipline. For all discipline (Table 3), discipline was modified or overturned in two-thirds of public sector cases. In non-discharge-related cases, public sector discipline was modified or overturned in 68.57 percent of cases. In discharge-related cases, public sector discipline was modified or overturned in nearly 65 percent of cases. In the private sector, discipline was modified or overturned in a consistent 55-58 percent of all cases, non-discharge cases and discharge cases alike.

Table 6. Arbitral Outcome of Discipline—Discharge of Grievants with No Prior Discipline

	Public		Private		Aggregate	
Upheld	33.33%	3	23.08%	6	25.71%	9
Modified	44.44%	4	65.38%	17	60.00%	21
Overturned	22.22%	2	11.54%	3	14.29%	5
Total		9		26		35

Table 6 provides a review related to discharged grievants with no previous disciplinary history and is discussed below Table 7.

Table 7. Arbitral Outcome of Discipline—Discharge of Grievants with No Previous Fight-related Discipline

	Public		Private		Aggregate	
Upheld	33.33%	1	42.86%	12	41.94%	13
Modified	33.33%	1	53.57%	15	51.61%	16
Overturned	33.33%	1	3.57%	1	6.45%	2
Total		3		28		31

Table 7 provides a review related to discharged grievants with no prior fight-related discipline, but with other prior discipline. The number of public sector cases in each table is quite small making meaningful analysis difficult. Within the private sector, however, those with no prior discipline (Table 6) were far less likely to have discipline upheld than those with other non-fight-related discipline. Still, less than one-half of grievants with prior non-fight-related discipline saw discipline upheld.

Table 8. Arbitral Outcome of Discipline—Discharge of Grievants with Previous Fight-related Discipline

	Public		Private		Aggregate	
Upheld	33.33%	3	46.15%	12	42.86%	15
Modified	55.56%	5	38.46%	10	42.86%	15
Overturned	11.11%	1	15.38%	4	14.29%	5
Total		9		26		35

Discharge was upheld for subsequent fight-related discipline in a comparable share of cases as to those with other previous discipline. Again, there are only a few public sector cases included. However, the private sector cases resulting in modified discipline decreased from almost 54 percent to just 38.5 percent (Tables 7 and 8). There is a large percentage increase in overturned discipline but just four cases are included. Across both sectors, arbitration offers a hopeful outcome for grievants, with two-thirds of public sector and 53 percent of private sector cases resulting in modified or overturned discipline.

REVIEW OF DISCIPLINE IMPOSED AND ARBITRAL OUTCOME—CASES INVOLVING AGGRAVATING FACTORS

Among the case details coded are several that can be considered aggravating factors: premeditation, continuing "bad blood," use of a dangerous weapon or implement, and an altercation between an employee and management personnel. The following analysis considers each of these factors.

Table 9. Discipline Imposed by Management—Cases Involving Premeditation

	Public		Private		Aggregate	
Discharge	50.00%	2	89.47%	17	82.61%	19
Suspension	50.00%	2	10.53%	2	17.39%	4
Total		4		19		23

In both employment sectors, only discharges and suspensions were imposed for cases involving premeditation. Although only a relatively small number of cases from each sector involved premeditation, the percentages of these cases in each sector involving the respective disciplines are generally consistent with discipline imposed in all considered cases (Table 1).

Table 10. Arbitral Outcome of Discipline—Cases Involving Premeditation

	Public		Private		Aggregate	
Upheld	100.00%	4	68.42%	13	73.91%	17
Modified	0.00%	0	31.58%	6	26.09%	6
Total		4		19		23

Although only a small number of cases are included, it does seem clear that arbitrators take a dim view of premeditation. All four public sector and over two-thirds of private sector grievances resulted in discipline being upheld.

Table 11. Discipline Imposed by Management—Cases Involving Bad Blood

	Public		Private		Aggregate	
Discharge	66.67%	8	84.09%	37	80.36%	45
Suspension	33.33%	4	15.91%	7	19.64%	11
Total		12		44		56

A number of cases involving "continuing bad blood" were reviewed, with bad blood either being specifically noted by the arbitrator or inferred from the overall context (e.g., repeated altercations). These cases resulted in discharge being imposed in nearly two-thirds of public sector and 84 percent of private sector cases. By contrast, discharge was imposed in just 42.6 percent, or 23, of all other public sector cases combined and in a consistent 90 percent, or 96 cases, of all other private sector cases (data not presented in tables).

Table 12. Arbitral Outcome of Discipline—Cases Involving Bad Blood

	Public		Private		Aggregate	
Upheld	41.67%	5	34.09%	15	35.71%	20
Modified	25.00%	3	52.27%	23	46.43%	26
Overturned	33.33%	4	13.64%	6	17.86%	10
Total		12		44		56

As contrasted to cases involving premeditation, those involving bad blood resulted in upheld discipline in only 42 percent of public sector and 34 percent of private sector cases. As with most other analyses to this point, grievants in these cases had a good chance of seeing their discipline modified or overturned—58 percent of public sector and two-thirds of private sector cases.

Table 13. Discipline Imposed by Management—Cases Involving Weapons

	Public		Private		Aggregate	
Discharge	33.33%	2	93.33%	14	76.19%	16
Suspension	66.67%	4	6.67%	1	23.81%	5
Total		6		15		21

Although just six public sector cases involved weapons, it is somewhat surprising that only two involved discharge. Given the prevalence of discharge cases in the private sector and the seriousness of involving a weapon in an altercation, it is not surprising that 14 out of the 15 private sector cases involving a weapon resulted in discharge.

Table 14. Arbitral Outcome of Discipline—Cases Involving Weapons

	Public		Private		Aggregate	
Upheld	33.33%	2	26.67%	4	28.57%	6
Modified	50.00%	3	46.67%	7	47.62%	10
Overturned	16.67%	1	26.67%	4	23.81%	5
Total		6		15		21

However, Table 14 suggests that arbitration may result in reduced or overturned discipline; nearly three-quarters of private sector and two-thirds of public cases were so resolved.

Table 15. Discipline Imposed by Management—Cases Involving Fights Between Employee and Management

	Public		Private		Aggregate	
Discharge	56.25%	9	86.21%	50	79.73%	59
Suspension	37.50%	6	13.79%	8	18.92%	14
Other	6.25%	1	0.00%	0	1.35%	1
Total		16		58		74

One-fourth of all public sector and 38 percent of all private sector cases involved altercations between an employee (grievant) and a supervisor or other management employee. The majority of these cases led to discharge. The “other” discipline in the public sector was a demotion.

Table 16. Arbitral Outcome of Discipline—Cases Involving Fights Between Employee and Management

	Public		Private		Aggregate	
Upheld	37.50%	6	37.93%	22	37.84%	28
Modified	37.50%	6	51.72%	30	48.65%	36
Overturned	25.00%	4	10.34%	6	13.51%	10
Total		16		58		74

Although Table 15 seems to make clear management’s dim view of employees fighting with management, Table 16 suggests arbitrators have taken a broader view. The detailed case summaries available at www.louisville.edu/labormanagement provide greater detail for the myriad circumstances and arbitral perspectives on these and all cases. However, with well less than 40 percent of disciplinary actions upheld, grievants seem to be garnering at least partial “wins” with discipline being modified in nearly one-half of cases overall.

Table 17. Discipline Imposed by Management—Cases Involving Two or More Aggravating Factors

	Public		Private		Aggregate	
Discharge	55.56%	5	83.33%	20	75.76%	25
Suspension	44.44%	4	16.67%	4	24.24%	8
Total		9		24		33

Table 17 reflects discipline imposed by management for cases involving two or more of the following aggravating factors: premeditation, continuing bad blood, involving a weapon or fighting with a manager. Although these represent a relatively small number of cases overall and within each sector, the prevalence of discharge is consistent with other findings in this study.

Table 18. Arbitral Outcome of Discipline—Cases Involving Two or More Aggravating Factors

	Public		Private		Aggregate	
Upheld	55.56%	5	37.50%	9	42.42%	14
Modified	22.22%	2	54.17%	13	45.45%	15
Overturned	22.22%	2	8.33%	2	12.12%	4
Total		9		24		33

Also consistent with other findings in the present study, arbitrators have reduced or overturned management imposed discipline in better than 60 percent of private sector cases involving two or more aggravating factors. With just nine public sector cases, it is difficult to draw any firm conclusions. However, within the private sector arbitration remains a fairly hopeful path for grievants.

REVIEW OF DISCIPLINE IMPOSED AND ARBITRAL OUTCOME—OTHER FACTORS

Table 19. Discipline Imposed by Management—By Seniority and Sector

		2 years or less		3-5 years		6-10 years		11-20 years		21+ years	
Public	Discharge	60.00%	3	66.67%	4	50.00%	6	38.46%	5	30.00%	3
	Suspension	40.00%	2	33.33%	2	33.33%	4	61.54%	8	70.00%	7
	Other	0.00%	0	0.00%	0	16.67%	2	0.00%	0	0.00%	0
	Total		5		6		12		13		10
Private	Discharge	93.33%	14	100.00%	14	83.33%	15	89.19%	33	80.00%	16
	Suspension	6.67%	1	0.00%	0	16.67%	3	8.11%	3	20.00%	4
	Other	0.00%	0	0.00%	0	0.00%	0	2.70%	1	0.00%	0
	Total		15		14		18		37		20

Note: Grievants' seniority could be determined in 46 public sector and 104 private sector cases.

As compared to all lesser seniority levels, there is a slightly lower percentage of private sector cases resulting in discharge for grievants with more than 20 years seniority. However, given that the vast majority (nearly 90 percent) of all private sector cases resulted in discharge, it is not surprising that a relatively consistent use of discharge is present through all seniority levels. However, the public sector cases reflect a declining imposition of discharge as seniority increases. About two-thirds of cases involving employees with five or fewer years seniority resulted in discharge, dropping to one-half in the 6-10 years category. At 11-20 years, discharge drops to less than 40 percent of cases. With more than 20 years seniority, it then drops to just 30 percent.

Table 20. Arbitral Outcome of Discipline—By Seniority and Sector

		2 years or less		3-5 years		6-10 years		11-20 years		21+ years	
Public	Upheld	40.00%	2	50.00%	3	50.00%	6	23.08%	3	20.00%	2
	Modified	0.00%	0	50.00%	3	33.33%	4	53.85%	7	70.00%	7
	Overturned	60.00%	3	0.00%	0	16.67%	2	23.08%	3	10.00%	1
	Total		5		6		12		13		10
Private	Upheld	40.00%	6	50.00%	7	55.56%	10	29.73%	11	50.00%	10
	Modified	40.00%	6	50.00%	7	38.89%	7	56.76%	21	35.00%	7
	Overturned	20.00%	3	0.00%	0	5.56%	1	13.51%	5	15.00%	3
	Total		15		14		18		37		20

Within the public sector just 40 percent of disciplinary actions were upheld for those grievants with two or fewer years of seniority, fully one-half of those with 3-10 years seniority and comparable shares of 23 and 20 percent of those with 11-20 and 21+ years seniority, respectively. These results are somewhat surprising where

expectations may suggest that increasing seniority would result in greater leniency. Still, at 11 plus years there is a greater likelihood of reduced or overturned discipline.

Private sector findings are even more surprising. Fully one-half of disciplinary action imposed in the 3-5, 6-10 and 21+ seniority classes resulted in upheld discipline. The greatest share of overturned disciplines resulted in the 2 years or less category, as it did in the public sector.

Table 21. Arbitral Outcome of Discipline—Discharges by Seniority and Sector

		2 years or less		3-5 years		6-10 years		11-20 years		21+ years	
Public	Upheld	66.67%	2	50.00%	2	50.00%	3	20.00%	1	33.33%	1
	Modified	0.00%	0	50.00%	2	16.67%	1	80.00%	4	66.67%	2
	Overturned	33.33%	1	0.00%	0	33.33%	2	0.00%	0	0.00%	0
	Total		3		4		6		5		3
Private	Upheld	42.86%	6	50.00%	7	46.67%	7	33.33%	11	43.75%	7
	Modified	35.71%	5	50.00%	7	46.67%	7	54.55%	18	37.50%	6
	Overturned	21.43%	3	0.00%	0	6.67%	1	12.12%	4	18.75%	3
	Total		14		14		15		33		16

Within the public sector 21 of the 46 cases in which seniority could be determined involved discharge grievances, 92 of the private sector cases involved discharge.

Fifty-three percent of all public sector discharges were upheld in cases involving grievants with 0-10 years seniority. Just one of five discharges in the 11-20 years seniority category and one of three in the 21+ years category were upheld. Certainly, a greater population of cases would be needed to draw any conclusions but discharge may be modified or overturned more often when involving those with greater than 11 years seniority.

In the private sector cases the two years or less, 6-10 years and 21+ years categories have comparable proportions of discharges being upheld. One-half of cases in the three-to-five years seniority category were upheld with the remaining 50 percent being modified. Across all seniority levels combined, arbitration remains favorable to grievants with less than half of discharges being upheld.

COMPARISONS TO PREVIOUS STUDIES

Three previous studies, from 1957 (Holly), 1976 (Jennings and Wolters) and 1988 (Adams, et al), also reviewed arbitral outcomes of discharge discipline related to fighting. Some caveats are necessary. First, none of the three earlier studies separated public and private sector cases. Second, the 1957 and 1988 studies do not state which BNA classifications were used for selecting cases. The 1976 study used 118.640 (assault, fighting, troublemaking, name calling, or profanity) (Jennings) and 118.645 (horseplay). The current study used 118.640 but also includes 118.6523 (assault on, offensive language, or other misconduct toward management personnel) and for public

employees, 100.552510 (assaults; fighting; troublemaking; harassment; obscene language or conduct; horseplay; discriminatory treatment).

The 1957 study reviewed arbitral outcomes of discharges from January 1942-August 1951 and from September 1951-March 1956. The 1976 study presented data from May 1971-January 1974. The 1988 study reviewed 53 fight-related discharge grievances from 1953-1986, although it is unclear what selection criteria were used.

Table 22. Discharge Discipline—Previous Studies of Arbitral Outcomes Compared to Current Study

	1957 Study		1976 Study	1988 Study	Current Study
	1942-1951	1951-1956 (52 cases)	1971-1974 (28 cases)	1953-1986 (53 cases)	1989-2003 (217 cases)
Upheld	48%	55%	43%	34%	40%
Modified or Overturned	52%	45%	57%	66%	60%

This table presents a relatively consistent trend of arbitral outcomes for discharge discipline across four studies reviewing arbitration decisions from 1942 to 2003. Except for the 1951-1956 study period arbitrators have consistently reduced or overturned discharge discipline for fighting in greater than one-half of cases. The latter three studies show a combined average of 39 percent of discharge disciplines upheld.

The 1988 study, however, suggested that "when a clear and unambiguous rule against fighting exists, management increases its chances that a discharge decision will be upheld (as occurred in 14 out of 29 applicable cases [or 48 percent of cases])(Adams, 1988)."

Table 23. Arbitral Outcome of Discipline: All Discharges Under a No Fighting/Violence Policy

	Public		Private		Aggregate	
Upheld	31.25%	5	39.24%	31	37.89%	36
Modified	56.25%	9	49.37%	39	50.53%	48
Overturned	12.50%	2	11.39%	9	11.58%	11
Total		16		79		95

In the current study cases were coded as to whether a no-fighting or workplace violence policy was in place. For reference, the full range of arbitral outcomes by sector and in aggregate are presented. However, only the aggregate numbers are appropriate for a comparison to the 1988 study. In contrast to the 1988 findings the current study revealed just 38 percent of discharges imposed under a fighting/violence policy were upheld, a full 10 percentage points difference.

However, differences in case selection criteria may be responsible to an uncertain degree. Over 50 percent of discharges were reduced and about 12 percent overturned. As noted in the 1988 study (Adams), many policies state that employees are subject to discipline up to and including discharge, which provides entrée for arbitrators to consider a range of discipline.

Table 24. Arbitral Outcome of Discipline: All Discharges Absent a No Fighting/Violence Policy

	Public		Private		Aggregate	
Upheld	40.00%	6	44.44%	24	43.48%	30
Modified	40.00%	6	38.89%	21	39.13%	27
Overturned	20.00%	3	16.67%	9	17.39%	12
Total		15		54		69

In contrast to the 1988 study, discharges in the current study period actually were upheld in a greater percentage of cases in which a no fighting/violence policy was not in place.

Table 25. Arbitral Outcome of Discipline: Discharges for Physical Altercations Under a No Fighting/Violence Policy

	Public		Private		Aggregate	
Upheld	41.67%	5	44.44%	20	43.86%	25
Modified	50.00%	6	44.44%	20	45.61%	26
Overturned	8.33%	1	11.11%	5	10.53%	6
Total		12		45		57

This table presents data related to arbitral outcome of all discharges of grievants involved in physical altercations, i.e., fights involving multiple or single blows made or attempted, grabbing/shoving and spitting, and where a no fighting/violence policy was in place. Below the data is discussed further.

Table 26. Arbitral Outcome of Discipline: Discharges for Physical Altercations Absent a No Fighting/Violence Policy

	Public		Private		Aggregate	
Upheld	36.36%	4	44.44%	8	41.38%	12
Modified	45.45%	5	33.33%	6	37.93%	11
Overturned	18.18%	2	22.22%	4	20.69%	6
Total		11		18		29

Table 26 presents data related to arbitral outcomes of all discharges of grievants involved in physical altercations but where a no fighting/violence policy was not in place. As compared to Table 25, there is little practical difference in discharges being upheld. On the public sector side, with just 12 and 11 cases included, respectively, just one case makes a measurable percentage difference but no meaningful conclusions can be drawn. Table 25 includes 45 private sector cases but only 18 private sector cases are included in Table 26. However, just over 44 percent of discharges were upheld in physical altercations with or without a policy in place; 55 percent of discharges were either modified or overturned.

CONCLUSION

Variation in research methods can make direct comparisons between studies difficult. However, many fighting policies include a range of discipline and do not mandate automatic discharge. This fact may give arbitrators more room to modify or overturn the discipline.

Not only does the arbitral outcome of modification or overturning of discipline hold true across cases for the present study, but it also holds up in the comparisons with two of the three past studies. In the 1976 study, 1988 study and current study, discipline was reduced or overturned in more than one-half of the arbitration cases.

Although there are differences in arbitral outcomes depending on what type of fight occurred and/or the context surrounding the fight, arbitration remains a good option for employees due to the likelihood of discipline being, at least, modified in favor of the grievant and possibly overturned altogether.

REFERENCES

Adams, M., Davis, L., & Jennings, K. (1988). "Employee Fighting: Will it Mean Discharge?" *Arbitration Journal, Volume 43, Number 2, 38.* As cited in Jennings Wolters.

Baroni, B. J. (1998). Mason Hanger Corporation, 111 LA 469, 472, as quoted in *Elkouri & Elkouri: How Arbitration Works,* 6th Edition, Washington, DC: Bureau of National Affairs, Inc.: 1016.

Bowers, M. H. (1997). State of Ohio, Department of Administrative Services/Office of Collective Bargaining and Ohio Civil Service Employees Association (OCSEA/AFSCME), Local 11, 109 LA 170.

Brodsky, D. M. (2000). Auto Warehousing Co. [Detroit, Mich.] and Shopmen's Local 508, 114 LA 699.

Brookins, R. (1997). EWI, Inc. and United Auto Workers of America, Local 5, 108 LA 50.

Brown, B. C. (1997). Detroit Newspapers [Sterling Heights, Mich.] and Individual Grievant, 109 LA 813.

Chandler, J. (2000). U.S. Foodservice, Everett, Mass. And International Brotherhood of Teamsters Local 829, 114 LA 1675.

CNN.com (2000, July 11). Mourners attend funeral for father killed in hockey rink fight. Retrieved May 17, 2006 from http://cnnstudentnews.cnn.com/2000/US/07/11/hockey.fight.02/

Felice, J. M. (1998). The Martin-Brower Company and Teamster Local 205, 111 LA 929.

Goodstein, B. (2001). Immigration and Naturalization Service, U.S. Border Patrol [Laredo, Texas] and National Border Patrol Council, AFGE Local 2455, 115 LA 1546.

Holly, F. (1957). "Considerations in Discharge Cases." *Monthly Labor Review,* Volume 8, Number 6, 684-688 as cited in Jennings, Ken and Roger Wolters (1976).

"Discharge Cases Reconsidered." *Arbitration Journal,* Volume 31, September 1976, 169.

Jennings, K., & Wolters, R. (1976). "Discharge Cases Reconsidered." *Arbitration Journal,* Volume 31, September 1976, 165 & 169.

Lamar, J. V., Jr. (Sept. 1, 1986). "Crazy Pat's Revenge." *Time Online*. Retrieved February 13, 2009 from http://www.time.com/time/magazine/article/0,9171, 962158,00.html

Ruben, A. M., Editor (2003) *Elkouri & Elkouri: How Arbitration Works,* 6th Edition, Washington, DC: Bureau of National Affairs, Inc.: 1015.

San Diego Union Tribune Online (2004, September 11). Busboy stabbed by co-worker. Retrieved February 13, 2009 from http://www.uniontribune.org/uniontrib/ 20040911/news_1m11busboy.html

Shieber, B. M. (2000). Dacco, Inc. [Cookeville, Tenn.] and United Auto Workers UAW Local 2409, 114 LA 1517.

Stewart, J. H. (1993). Town of Cromwell [Conn.] and IBPO, Local 357, 101 LA 388.

Strongin, Andre (1993). Lukens Steel Company, Subsidiary of Lukens, Inc. and Local 1165, United Steelworkers of America, 101 LA 568.

Witt, Helen M. (1995a). Bethlehem Structural Products Corporation [Bethlehem, Pa., plant] and United Steelworkers of America Local 2559, 105 LA 205.

Zirkel, Perry A. (1990). City of Scranton [Pa.] Sewer Authority and Teamsters Local 222, 94 LA 920.