C-20301
A+B

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	Case Nos. F94N-4F-D 97049958
	)	F94N-4F-D 97042013
UNITED STATES POSTAL SERVICE	)	
	)	
and	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

BEFORE:	Carlton J. Snow, Professor of Law
APPEARANCES:	For the Postal Service: Mr. Kevin B. Rachel
	For the Union: Mr. Keith E. Secular
PLACE OF HEARING:	Washington, D.C.
DATE OF HEARING:	April 21, 1999
POST-HEARING BRIEFS:	August 2, 1999
CONTRACT YEAR:	1994-1998
TYPE OF GRIEVANCE:	Contract Interpretation

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement when it engaged in *ex parte* communication with the arbitrator during an *in camera* inspection of evidence in the presence of only the Employer's advocate. The grievance is remanded to Step 3 of the grievance procedure before a different regional arbitrator. An *in camera* review of evidence, if protested by a party, constitutes improper *ex parte* communication with the arbitrator. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: January 4, 2000

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	
	)	
UNITED STATES POSTAL SERVICE	)	ANALYSIS AND AWARD
	)	
AND	)	Carlton J. Snow
	)	Arbitrator
NATIONAL ASSOCIATION	)	
OF LETTER CARRIERS	)	
(Case Nos. F94N-4F-D 97049958	)	
F94N-4F-D 97042013)	)	

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from November 21, 1994 through November 20, 1998. A hearing was held on April 21, 1999 in a conference room of the United States Postal Service headquarters building located at 475 L'Enfant Plaza in Washington, D. C. Mr. Kevin B. Rachel, Deputy Managing Counsel, represented the United States Postal Service. Mr. Keith E. Secular of the Cohen, Weiss and Simon law firm in New York, N. Y. represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. The parties had a full opportunity to submit evidence, to examine and cross-examine

witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. Personnel for Diversified Reporting Services, Inc. tape-recorded the proceeding for the parties and submitted a transcript of 59 pages.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties acknowledged that the matter properly had been submitted to arbitration. They elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs, and the arbitrator officially closed the hearing on August 2, 1999 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Was the National Agreement violated when an arbitrator ruled during the hearing that he would take evidence *in camera* without the union representative being present?

III. RELEVANT CONTRACTUAL PROVISIONS

MEMORANDUM OF UNDERSTANDING

> The United States Postal Service and the National Association of Letter Carriers, AFL-CIO, agree that in order to maintain the integrity of the arbitral process, the parties and their agents, employees and representatives should avoid the least appearance of impropriety when making contact with an arbitrator. The parties must maintain an arms length relationship with the arbitrator at all times.
>
> Ex parte communication with an arbitrator regarding the merits of a dispute, whether oral or written, shall not be permitted. Whenever it is necessary to contact an arbitrator relative to the merits of a matter in a dispute, the contact must in all instances be made jointly or with the concurrence of both parties. Ex parte communications made in the ordinary course of business regarding necessary, routine scheduling matters are permissible.

IV. STATEMENT OF FACTS

In this case, the parties disagree with respect to whether an arbitrator has discretionary authority under the parties' agreement to hold an *in camera* (not in open hearing)review of evidence with only one party present. The facts of the case are not in dispute between the parties, and it is only the consequences of the facts that are in dispute. A brief statement of facts will place the dispute in context.

Management placed an employee in off-duty status under emergency procedures and, subsequently, issued him a Notice of Removal

for "unacceptable conduct: discarding deliverable mail." (*See* Union's Exhibit No. 1.) The Union filed a grievance in his behalf. During the grievance process, a Union representative requested an examination of the mail that precipitated the discharge as well as an explanation of how management marked the pieces in order to be able to tell that the grievant discarded deliverable mail. The Employer denied the request.

The case proceeded to arbitration. During the arbitration process, a regional arbitrator undertook an *in camera* review of the marked mail outside the presence of the advocate for the Union. The Union objected to the arbitrator's *in camera* review and described it as an improper *ex parte* communication by management with the arbitrator. The Employer maintains that such *ex parte* communication with the arbitrator is protected under a law enforcement privilege. When the parties were unable to resolve their differences, the matter proceeded to arbitration at the national level.

V. POSITION OF THE PARTIES

A. The Union:

It is the position of the Union that a regional arbitrator exceeds his or her authority and violates the parties' agreement by reviewing evidence *in camera* without the active participation of the Union. The Union contends that, because the evidence in dispute was offered as a part of the Employer's case in chief against the grievant, such evidence addressed the merits of the dispute; and it allegedly involved an *ex parte* communication as defined by a Memorandum of Understanding between the parties. It is the belief of the Union that arbitration decisions support its theory of the case in this matter and override established authority of arbitrators to decide "procedural" matters even during an arbitration hearing.

The Union also argues that it violates a grievant's due process rights for an arbitrator to examine evidence in the presence of only one party, especially when the other party vigorously objects to being excluded from the process. It is the position of the Union that an employer violates the principle of just cause if an employee is denied due process throughout the grievance procedure, including arbitration. According to the Union, the concept of due process requires that a grievant be provided an opportunity

to confront his or her accusers; and an *in camera* review of evidence by an arbitrator in the presence of only one party allegedly violates an individual's right to due process. By denying an employee the opportunity to confront his accusers as well as the evidence against him in this case, the Union concludes that management denied the grievant due process.

The Union also maintains that neither the law of the shop, nor judicial guidelines, nor NLRB precedent support the Employer's reliance on a "law enforcement privilege" within the context of the collective bargaining relationship between the parties. The Union asserts that the Employer is without standing to assert any "law enforcement privilege" because it is not considered a governmental law enforcement agency. Moreover, any such privilege only allows a governmental law enforcement official to refuse a request for information and does not permit evidence to be submitted *in camera* and *ex parte,* according to the Union. Lastly, the Union contends that courts consistently deny the application of a law enforcement privilege when it results in substantial prejudice to a defendant, as is the case with regard to the grievant in this matter. Hence, the Union concludes that the Employer misapplied the law enforcement privilege in this case and, in the process, denied the grievant due process protections owed him under the parties' collective bargaining agreement.

B. The Employer

The Employer argues that, because the parties agreed to submit the dispute involving the grievant in this case to arbitration, all further matters surrounding the dispute constitute procedural issues to be resolved by the appointed arbitrator. It is the belief of the Employer that numerous arbitration decisions support such a conclusion. Based on this groundwork, the Employer, then, reasons that the regional arbitrator whose decision triggered this dispute recognized the issue as procedural in nature and relied on his implicit authority to make a procedural ruling by undertaking an *in camera* review of evidence without one party present. According to the Employer, the existence of such arbitral authority places an unusually heavy burden of proof on the Union to show that the Employer did not have authority to make its request or that the arbitrator abused his authority to decide the procedural issue he confronted.

Nor, in the opinion of the Employer, does the Memorandum of Understanding on which the Union relies support a contrary conclusion. It is the belief of the Employer that the Memorandum of Understanding was designed to maintain the integrity of the arbitral process and to avoid the appearance of impropriety. The Employer contends that the Memorandum of Understanding was not designed to prohibit all *ex parte* communication

with an arbitrator, as evidenced by exceptions included in the document itself. Furthermore, the Employer believes that the language of the Memorandum of Understanding does not support its application to procedural decisions made by an arbitrator during an arbitration hearing.

Additionally, the Employer believes that the law enforcement privilege supports its conclusion that no contractual violation occurred in this case. A judge in a court of law must decide whether or not the law enforcement privilege will apply through the use of an *in camera* review, it is appropriate for an arbitrator, as the presiding official at a hearing, to make the same decision, according to the Employer.

Finally, the Employer maintains that the *in camera* review of evidence in this case without the presence of a Union representative, was within the discretionary authority of a regional arbitrator. Numerous judicial decisions show the wide latitude judges are given in conducting an *in camera* review, and the Employer argues that such guidelines are useful to regional arbitrators in determining whether or not particular evidence should be shared with an arbitrator with only one party present. The Employer believes that the regional arbitrator in this case had the authority to conduct an *in camera* review and that, on finding the evidence to be of a confidential nature, to rule that the need for confidentiality outweighed any

potential prejudice against the grievant. Accordingly, the Employer concludes that the arbitrator had discretionary authority to undertake an *in camera* review of evidence and to rule that the evidence and the results of his review should not have been shared with the Union. Hence, there has been no due process violation and no contractual violation, in the opinion of the Employer.

VI. ANALYSIS

A. Common Law of the Contract

Collective bargaining agreements are not ordinary contracts. (*See*, St. Antoine, *The Common Law of the Workplace*, 65 (1998).) A collective bargaining agreement is an instrument of government as much as it is an instrument of exchange. Especially in an enterprise employing upwards of 800,000 employees, a collective bargaining agreement simply cannot cover every detail of an active relationship between the parties. As Professor Archibald Cox once observed, "many provisions of the labor agreement must be expressed in general and flexible terms." (*See* "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 23 (1958).) An arbitration provision in a collective bargaining agreement, absent specific limitations, mirrors the same flexibility found in the overall agreement itself. As the eminent Harry Shulman observed:

> The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. (*See* "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955).)

An aspect of collective bargaining agreements that makes them unique is that they come into existence within a universe of established arbitral principles which parties to the contract are presumed to understand. Parties know that arbitrators will interpret their agreement against the backdrop of relationships that may not be carefully defined in their agreement. As Professor David Feller, past president of the National Academy of Arbitrators, taught, "there is a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist." (*See* 2 Ind. Rel. L.J. 97, 104 (1977).) Parties have every right to ignore this panoply of default principles and to bargain around the principles to their satisfaction, but the absence of contractual instructions means that arbitrators will rely on established arbitral jurisprudence as the context for construing the common law of the labor contract.

An arbitrator, of course, is controlled by explicit limitations set forth in the terms of the collective bargaining agreement. If the parties are able to reach agreement, they may restrict arbitral authority by setting forth the limitation in their collective bargaining agreement. Thus, an arbitrator decides cases within the confines of implicit and explicit limitations set forth in the parties' agreement as well as within the confines of arbitral

jurisprudence, especially as it is expressed in default rules of contract interpretation.

B. *Ex Parte in Camera* Review

It is important to highlight the fact that the Employer argued for an arbitrator not only to review evidence *in camera* but also to do so with only one party present. The Employer anchored its contention that arbitral authority includes the right to undertake *in camera* review by asserting the right of evidentiary privilege. In other words, the Employer maintained the existence of a right to limit the Union's ability to inquire about certain information even though it would have been probative for the Union's advocate to do so. Such an evidentiary privilege allegedly was legitimate in the regional level arbitration proceeding because of the Employer's need to protect the confidentiality of its marking system for detecting discarded deliverable mail. The Employer argued that its protection of confidential information was more important than the arbitrator's giving the grievant's advocate an opportunity to submit documents and witnesses to cross-examination in an effort to discover the

truth. The right to an evidentiary privilege is an accepted part of American common law and has been codified in Rule 501 of the Federal Rules of Evidence. A judge, then, would use Rule 104 to test the existence of an evidentiary privilege.

It is generally recognized that the government has an evidentiary privilege which enables it to refuse to provide evidence on a showing of a reasonable likelihood of danger that the evidence will disclose a secret of state or official information. Such official information might well extend to any communication between an employee and the Employer's counsel if the employee is divulging information which he or she obtained in the course of performing duties for the Employer. (*See, e.g., Upjohn Company v. United States,* 449 U.S. 383 (1981).)

In order for a party to invoke an evidentiary privilege, it would be necessary for an advocate to lay a foundation for the request before the arbitrator. Elements of that foundation would include proving that the information the Employer sought to suppress was privileged. It would be necessary to establish that it was confidential information that had been properly accumulated between the Employer and an employee. To establish the existence of an evidentiary privilege, the arbitrator necessarily would have to reach determinations about the relevancy of the evidence.

If a governmental entity seeks an evidentiary privilege, courts have treated state secrets and minor government secrets differently. State secrets generally enjoy an absolute privilege. (*See United States v. Reynolds,* 345 U.S. 1 (1953).)Minor government secrets enjoy a conditional privilege. (*See Ackerly v. Ley,* 420 F.2d 1336 (D.C. Cir. 1969).) If it is something less than a state secret, a party wanting to view the evidence generally can defeat the privilege by demonstrating a compelling need for the information. The "minor government secrets" privilege promotes candor within the government and encourages a free flow of information.

In order for an arbitrator to assess the claim of an evidentiary privilege, it might be necessary first to examine *in camera* the materials as to which the claim was asserted. It is with reluctance that courts sometimes find it necessary to examine material *in camera* in order to determine whether an adequate showing has been made that evidence qualifies for the privilege. *(See, e.g., Black v. Sheraton Corp. of America,* 564 F.2d 531 (D.C. Cir. 1977); *Franklin National Bank Securities Litigation,* 478 F.Supp. 577 (E.D.N.Y. (1979); *Carl Zeiss Stiftung v. VE.B. Carl Zeiss,* 40 F.R.B. 318 (D.D.C. 1966), *cert. denied,* 389 U.S. 952 (1967).) If an arbitrator were examining evidence *in camera* to determine entitlement to an evidentiary privilege, it would be necessary to understand (1) the relevancy of the

evidence; (2) the availability of other evidence; and (3) the general nature of the case.

It is generally conceded that the need for an evidentiary privilege may be greater in criminal cases than in a civil case. (*See United States v. Nixon,* 418 U.S. 683 (1974).) The dispute before the arbitrator in this case involved a civil matter. If an arbitrator made an *in camera* examination of evidence, he or she, then, could take reasonable protective measures to separate privileged from nonprivileged evidence. Arbitrators, just like courts, in deciding whether to make *in camera* examinations of evidence, should be guided by "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." (*See Boeing Airplane Co. v. Coggeshall,* 280 F.2d 654, 662 (D.C. Cir. 1960).) To encourage the free flow of information, courts rarely honor an open-ended claim of privilege and generally require that an evidentiary privilege be invoked on a document by document basis and that each claim be supported by specific facts. (*See, e.g., Holifield v. United States,* 909 F.2d 201, 204 (7th Cir. 1990); and *United States v.Lawley,* 709 F.2d 485 (7th Cir. 1983).) The entire process, however, of ruling on a claim of privilege may require an *in camera* inspection of allegedly privileged material. An *in camera* inspection of disputed documents is burdensome, and it is generally

recognized that submitting evidence to the process of examination and cross-examination produces a more thorough result and is more consistent with the American way of justice. (*See, e.g., Meade Data Central, Inc. v. U.S. Department of Air Force,* 566 F.2d 242 (D.C. Cir. 1977); *Collins and Aikman Corp. v. J. P. Stevens & Co.,* 51 F.R.D. 219 (D.S.C. 1971); and *United States v. Zolin,* 491 U.S. 554 (1989).) Courts, nevertheless, have ordered parties to submit documents directly to an arbitrator for an *in camera* inspection. (*See American Federation of Television and Radio Artists v. W. J. B.K-TV,* 1999 W.L. 11496 (6th Cir. (Mich.).) But it is a process rarely used and only after restrictive standards have been met. It also is one of those default rules that can be modified by contract.

As for the Employer's assertion of a "law enforcement privilege," it is not a privilege well developed in law and certainly not in arbitration. In the common law, courts are now expected to deal with privileges on a case-by-case basis; and the privilege of a witness will be tested in light of reason and experience on a case-by-case basis. (*See, e.g., Samuelson v. Susen,* 576 F.2d 546 (3rd Cir. 1978).) Even if a court applies a qualified privilege for investigatory reports compiled for law enforcement purposes, it is necessary for a party to prove that the law enforcement agency's need for confidentiality is more important than a criminal

defendant's need to review the allegedly privileged material. (*See, e.g., Denver Policemen's Protective Association v. Lichtenstein,* 660 F.2d 432, 437-438 (10th Cir. 1981).) Some courts also require proof that law enforcement files allegedly protected from disclosure are files closely connected with a simultaneous criminal investigation. (*See, e.g., In Re Department of Investigation,* 856 F.2d 81, 486 (2nd Cir. 1988).) No evidence submitted to the arbitrator in this case established that the Employer qualified for a law enforcement privilege involving a law enforcement proceeding in which the disputed materials would be pivotal. Even if the Employer had legal standing to qualify for a law enforcement privilege (a fact not proven), it also needed to prove that disclosure of such law enforcement investigatory materials would be contrary to the public interest, a fact also not proven. Moreover, even if the Employer qualified for a law enforcement privilege, no evidence established that such a right could not be modified by contract, a modification which allegedly occurred in this case. Nor does the Code of Professional Responsibility for Arbitrators of Labor/Management Disputes instruct an arbitrator on *in camera* proceedings. The Code states simply that, "in determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances." (*See* Sec. 5(C)(1).)

C. Teaching of the Contract

The regional arbitrator who undertook an *in camera* inspection of evidence in this case exercised the established authority of arbitrators to make procedural decisions involving the arbitration process, and he also reviewed the disputed material with only the employer present. The parties specifically addressed the matter of *ex parte* communication with an arbi-: trator in their 1988 Memorandum of Understanding. The parties agreed that:

> In order to maintain the integrity of the arbitral process, the parties and their agents, employees and representatives should avoid the least appearance of impropriety when making contact with an arbitrator. The parties must maintain an arms length relationship with the arbitrator at all times.
>
> *Ex parte* communication with an arbitrator regarding the merits of a dispute, whether oral or written, shall not be permitted. Whenever it is necessary to contact an arbitrator relative to the merits of a matter in a dispute, the contact must in all instances be made jointly or with the concurrence of both parties. *Ex parte* communications made in the ordinary course of business regarding necessary, routine scheduling matters are permissible. (*See* Union's Exhibit No. 3, emphasis added.)

The Employer maintained that, despite the language of the Memorandum of Understanding, not all *ex parte* communication between a party and an arbitrator had been forbidden by the agreement of the parties. In particular, the Employer asserted that the parties never intended to preclude an advocate from providing an arbitrator with an *in camera* review

of sensitive investigative techniques, such as the marking techniques at issue in this case.

The language of the parties' Memorandum of Understanding, however, is clear and unambiguous. It restricts all forms of *ex parte* communication with an arbitrator when a party is discussing the merits of a dispute. Marking techniques used by postal inspectors, which allegedly identified the grievant's discarded deliverable mail, clearly addressed the merits of the dispute. Moreover, the parties have used straightforward language in their Memorandum of Understanding to exclude only routine scheduling matters. No evidence in the document itself supports a conclusion that the parties intended the Memorandum to exclude sensitive investigative techniques from its coverage. While in a typical case an arbitrator has a right to test a request not to disclose evidence by undertaking an *in camera* review, the specific agreement between the parties in this case makes it reasonable to conclude that the arbitrator's *in camera* review constituted an improper mode of *ex parte* communication with an arbitrator.

Not only internal but also external evidence with respect to the contractual intent of the parties makes clear that the arbitrator's *in camera* review constituted improper *ex parte* communication by a party with the

arbitrator. Evidence presented to the arbitrator in the national level hearing established that an insufficient foundation was laid in the regional level hearing to establish that the Employer qualified for an evidentiary privilege in this case.

The arbitrator received evidence from Mr. James Stankovich, a union advocate, who testified that he had been involved in cases where management explained its techniques for secretly marking the mail used by postal inspectors. (*See* Tr. 42.) While the testimony was by no means conclusive, it made clear that no past practice of nondisclosure exists. Additionally, an agreement reached by the parties in what they characterized as the "Broken Arrow" agreement helped verify the intent of the parties in their "no *ex parte* communication" Memorandum of Understanding. In the "Broken Arrow" case, a regional arbitrator "issued a ruling that would have excluded the Employer's representative from the hearing room during the Union's oral closing statement" (*See* Union's Exhibit No. 5.) Mr. Pete Bazyelwicz, Manager of Grievance and Arbitration at the national level, and Mr. William H. Young, NALC national vice-president, reached the following settlement agreement in that dispute:

> In the absence of a contractual provision to the contrary, an arbitrator has inherent authority to decide procedural questions raised at the arbitration hearing. At the same time, the

> arbitrator has no authority to contradict procedural rules that the parties themselves have bargained for and made a part of their Collective Bargaining Agreement.
>
> In this particular case, the MOU on ex parte communication would prohibit the ruling made by this particular arbitrator. (*See* Union's Exhibit No. 5, p. 1.)

The parties agreed that the matter should be remanded and that, even if the union advocate made an oral closing statement while the employer's advocate filed a post-hearing brief, the employer's advocate could not be excluded from the arbitration hearing during the union's oral closing argument. The parties recognized that to have excluded the employer's advocate would have engaged the union's advocate in improper *ex parte* communication with the arbitrator.

Language in the parties' agreement as well as their interpretation of the Memorandum of Understanding support a conclusion that the Memorandum of Understanding controls all *ex parte* communication with an arbitrator even when he or she is dealing with procedural issues. The parties agreed to restrict an arbitrator's ordinary discretionary authority over procedural rulings in the arbitration process, and it is their right to design the grievance-arbitration system in a way that meets their specific needs. The contractual prohibition against *ex parte* communication with an arbitrator is explicit and unambiguous, and the only

exception covers "routine scheduling matters." The *in camera* review of evidence in the regional case was pivotal to the merits of the case and hardly constituted a "routine scheduling matter." It also violated fundamental due process rights of the grievant.

D. Due Process Issues

One scholar has defined five elements of due process in the workplace as follows:

(1) Timely action by the Employer;
(2) A fair investigation;
(3) A precise statement of the charges;
(4) A chance for the employee to explain before the imposition of discipline; and
(5) No double jeopardy. (*See* Brand, *Discipline and Discharge in Arbitration*, 37 (1998).

While not all arbitrators necessarily would adopt these five elements, courts are even less precise about the elements of due process. One court would require only that an employee be allowed to give his or her version of the events. (*See Campbell v. Purtle,* (8th Cir. No. 98-4149, July 21, 1999).) Another would allow an employee to be denied privileges without knowing the source of complaints against him. (*See Goodstein v Cedar-Sinai*

Medical Center, Cal. Cpp. App., No. B113235, Sept. 29, 1998.) Yet another would allow an employee to be terminated so long as the employer had reasonable grounds for believing an allegation of misconduct, even in the absence of definitive proof. (*See Cotran v. Rollins Hugie Hall Int'l, Inc.* California Superior Court No. S057098, January 5, 1998.)

The United States Supreme Court requires "some kind of a hearing" where an employee "had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits." (*See Arnett v. Kennedy,* 416 U.S. 134 (1974).) In determining precisely what process is due under an employee's due process right, it seems clear that (1) an opportunity to cross-examine witnesses and (2) to rebut evidence constitute essential elements of due process. Over a decade ago in a regional postal case, an arbitrator concluded that the "right to confront" is a key ingredient of the doctrine of just cause. He stated:

> A Postal Inspector, in a discipline case, acts as the agent of the Service, and the Union is entitled to examine and explore all the facts within the knowledge of the Inspector, not just those favorable to the Service. In short, a Postal Inspector is to be treated as any other witness [in a case involving a failure to deliver mail]. (*See* Case No. W4N-5N-D 40950 (1987), p. 3.)

The ruling is consistent with a conclusion that not only must the Employer establish a basis for qualifying for the evidentiary privilege it sought in this

case but also that its denial of the grievant's right to confront violated the just cause principle codified in the parties' collective bargaining agreement. In denying the grievant an opportunity to cross-examine evidence reviewed by the arbitrator *in camera* and *ex parte*, the Employer denied the grievant an opportunity to confront his accusers and acted inconsistently with the requirement of due process in the workplace as memorialized in the just cause provision of the parties' agreement.

No evidence submitted to the arbitrator suggested that either party relinquished any due process rights as a part of their contractual agreement. In fact, inclusion of a just cause clause in their agreement incorporated into the contract an opportunity for meaningful participation in an adversary hearing on the merits of a claim. The concept of just cause includes a due process element, and due process preserves the availability of established procedures for resolving disputes in arbitration. Arbitrators and courts alike have recognized that, "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." (*See Goldberg v. Kelly,* 397 U.S. 254, 269 (1970); *see also Mitchell v. W. T. Grant Company,* 416 U.S. 600, 617 (1974).) Adoption of a broadly based, loosely applied law

enforcement privilege would deny a grievant an opportunity to contradict evidence on the merits of his or her claim and would undermine meaningful participation in an adversary hearing.

Arbitration in the parties' dispute resolution system gives a grievant his or her proverbial "day in court." The concept of due process helps protect that contractual expectation. Due process helps insure the orderly administration of the grievance/arbitration system, and it also gives a degree of predictability to the arbitration system that allows advocates to structure their case preparation and presentation with some minimum assurance as to how the arbitration process will unfold. A reasonable expectation is that, absent extraordinary circumstances, an arbitrator will not adjudicate rights under an agreement unless traditional safeguards, such as the right to confront and cross-examine, have been protected. While due process is a concept grounded in many other principles basic to a free society, it is also a contractual right assured the grievant by the parties' adoption of a just cause clause in their collective bargaining agreement. No evidence submitted to the arbitrator established a necessity sufficient to justify compromising due process rights in this case nor a basis for finding that the parties intended to carve out an exception to traditional due process protections long recognized by labor arbitrators.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement when it engaged in *ex parte* communication with the arbitrator during an *in camera* inspection of evidence in the presence of only the Employer's advocate. The grievance is remanded to Step 3 of the grievance procedure before a different regional arbitrator. An *in camera* review of evidence, if protested by a party, constitutes improper *ex parte* communication with the arbitrator. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: January 4, 2000