

APPENDIX E

Practicum Exercise Example

**A PRACTICUM EXERCISE
FOR
GENERAL PRACTICE:
SKILLS PRACTICUM
FALL 2016**

EMPLOYMENT/LABOR LAW

Advocacy Training Options

- **Arbitration**
- **Negotiation**
- **Mediation**
- **Motions / Oral Argument**

*Midstate University (Employer)
and
Pat Rogers (Employee) and
State Professional Employee Union (SPEU)*

Midstate University (Employer)
and
Pat Rogers (Employee) and
State Professional Employee Union (SPEU)

By: John O. Sonsteng and Linda M. Thorstad

with Jennifer W. Miller

NITA PRACTICUM EXERCISE

The **NITA PRACTICUM EXERCISE** is an effective tool for assisting attorneys and students in developing and improving effective **Advocacy Skills**.

The **NITA PRACTICUM EXERCISE** is self contained and has all necessary information. No outside research is required.

NITA Advocacy Training Options

The **NITA PRACTICUM EXERCISE** may be used in the following **Advocacy** Training Programs:

- **Arbitration** • **Negotiation** • **Mediation** • **Motions/Oral Argument**

The **NITA PRACTICUM EXERCISE** contains the following:

- ***Party and Witness Statements/Depositions***
The statements/depositions of the parties and witnesses are included in the exercise materials.
- ***Procedural and Factual History***
The Procedural and Factual History provides an introduction and the legal and factual background of the exercise.
- ***The Facts***
The facts are complete.
- ***Applicable Law***
This section contains applicable law.
- ***The Pleadings***
The pleadings are complete and accurate.
- ***Case and Strategic Analysis***
The case and strategic analysis is a preliminary guide. It provides the basis for a more sophisticated analysis, preparation and performance.

Supplemental Learning and Teaching Materials

The Supplemental Learning and Teaching Materials are located on the CD.

- ***Planning Guide and Check List***
The Planning Guide and Check List is an outline that assists in the preparation of legal substance and presentation. It provides the basis for more detailed planning.
- ***Learning Objectives***
The Learning Objectives provide a method to measure achievement.
Oral – the oral learning objectives assist in planning and delivering the assigned oral skill.
Written – the written learning objectives assist in developing and presenting both written and oral skills.

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(Witnesses: Police Chief Troy and President D. Laterno)

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(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)

Exhibit 23: Letter from Pat Rogers to Union Advocate

(Witnesses: Pat Rogers and President D. Laterno)

Exhibit 24: Letter from President D. Laterno to Attorneys Representing Midstate University

(Witnesses: Pat Rogers and President D. Laterno)

Supplemental Learning and Teaching Materials..... 59

Planning Guide and Checklist

Section 1. General

Section 2. Negotiation

Section 3. Mediation

Section 4. Discovery

Section 5. Motions - Oral Argument

Section 6. Trial (Court/Jury) - Arbitration

Learning Objectives

Depositions

Trial (Court/Jury) - Arbitration

Negotiation

Mediation

Motions/Oral Argument

Expert Witnesses

VERY IMPORTANT

**DIRECTIONS FOR DETERMINING DATES, AGES
AND APPLICABLE LAW**

In order to keep this exercise current and workable for any time and place, dates, ages and statutes MUST be inserted where indicated by a blank line and a bold instruction in parentheses.

DATES

Use a current calendar. Dates are to be calculated from the date assigned by the instructor. Should an event occur on a holiday, the holiday should be ignored unless specifically indicated by the exercise or the instructor.

Dates are NOT an issue in an exercise unless specifically indicated by the instructor.

The following formula will permit correct dates to be inserted where necessary.

- * All dates following the assignment of the exercise are indicated by a “plus” (+) sign, followed by the number of days, weeks, months, or years to be counted:
(day +1), (week +1), (month +1), (year +1)
- * All dates preceding the assignment of the exercise are indicated by a “minus” (-) sign, followed by the number of days, weeks, months, or years to be counted:
(day -1), (week -1), (month -1), (year -1)
- * The date assigned by instructor is:
(day 0), (week 0), (month 0), and (year 0).
- * **NEVER** count the current day, week, or month when calculating the dates.

The Following Examples Show How to Calculate and Insert the Dates.

Example 1:

- * The exercise is assigned on **Friday, July 29, 2005.**
 - * ***Before*** the date is inserted, the exercise reads as follows:
We purchased the stock on _____ **(Wednesday, Week -3).**
 - * Do not count the current week. Count back three weeks. The date that must be inserted is July 6, 2005.
 - * ***After*** inserting this date, the exercise will now read:
We purchased the stock on July 6, 2005 **(Wednesday, Week -3).**

Example 2:

- * The exercise is assigned on **Monday, August 8, 2005.**
- * ***Before*** the date is inserted, the exercise reads as follows:
I bought the house on _____ (**1st Wednesday, Month -28**).
- * Do not count the current month. Count back 28 months. The date that must be inserted is Wednesday, April 2, 2003.
- * ***After*** inserting this date, the exercise will now read:
I bought the house on Wednesday, April 2, 2003. (**1st Wednesday, Month -28**).

AGES

The ages of clients and other people may be found throughout the exercise.

Example:

- * I was born on April 18, _____ (**Year -48**).

This indicates that the person would be 48 years old.

APPLICABLE LAW

Unless otherwise indicated by the exercise, the law of your jurisdiction will apply.

Example:

- * ***Before*** the current statutory reference is inserted, the exercise reads as follows:

The above-named juvenile is alleged to be delinquent pursuant to _____ (**state statute**) because the juvenile has violated a state/local law as follows ...

- * ***After*** inserting the current statutory reference, the exercise will now read:

The above-named juvenile is alleged to be delinquent pursuant to NITA Stat. 609.015 (**state statute**) because the juvenile has violated a state/local law as follows ...

PROCEDURAL AND FACTUAL HISTORY

ASSUME THE DAYS AND DATES IN THIS EXERCISE ARE ACCURATE.

The following facts and procedures are agreed to by the parties and must be accepted by them. These facts may be considered as agreed evidence and may be used in the opening statement and closing argument.

INTRODUCTION

This dispute centers around the discharge of an employee, Pat Rogers, by Midstate University. Pat Rogers is a member of the State Professional Employee Union (SPEU). Under the terms of the Collective Bargaining Agreement between Midstate University and State Professional Employee Union (SPEU) the University installed the Rules of Employment and Management of the Off Campus Liquor Store governing the employment of Pat Rogers. The University alleges Pat Rogers violated the Rules of Employment and Management of the Off Campus Liquor Store, Rule 6 by knowingly selling alcohol to an intoxicated person and terminated Rogers. Under the terms of the Collective Bargaining Agreement, this matter will be heard by an arbitrator.

Midstate University has been under considerable financial pressure for the last five years. The legislature has continually reduced funding and many programs have been cut. The President of the University has worked very hard to create new sources of funding.

One year ago, Martin and Julia Wong made a substantial contribution to Midstate University. The Wongs were both graduates of the University and felt the University gave them an opportunity for an education and for their subsequent success. The Wongs owned a liquor store located across the street from Midstate University campus. They donated the liquor store and its proceeds to the University. The Off Campus Liquor store has an annual net return of at least \$1,000,000. The Wongs placed conditions on their contribution:

- The liquor store could not be sold, and
- The annual proceeds had to be spent for developing or the continuation of programs that assist minority persons to compete successfully for admission to the University and to successfully complete a University education.

The importance of this gift cannot be understated as all affirmative action programs have been terminated by the state and there are no other funds for a program of this nature.

The gift was controversial. Over the last five years the use of alcohol by students on campuses throughout the state, at both public and private schools, has reached serious levels. There were three student deaths in the last year attributed to alcohol. Student binge drinking has become a serious problem and Midstate

University has passed strict rules about the use of alcohol on campus and by underage persons. The newspaper as well as some legislators have been critical of the University's acceptance of the gift and the conditions. One headline read: "UNIVERSITY SELLS ITS SOUL FOR ALCOHOL MONEY."

The President of the University understands the problem but concludes the money is critical for necessary programs. The President believes strict management rules can prevent abuse or problems.

Working with the University attorney, the President developed rules for the liquor store.

About eight months ago, after the gift was accepted and the University had taken possession of the liquor store, Midstate University advertised for a manager for the store. Pat Rogers, a single parent of two young children answered the ad. Rogers was the successful owner of a small chain of bagel/coffee shops near campus and in some of the trendy shopping areas. Although successful in the bagel business, Rogers wanted a more stable life, wanted to be able to have more time with the children and found the benefits of the University system very attractive. Midstate University provides reduced tuition for children of employees at the University-run elementary school and high school. The University also has excellent health and retirement benefits.

Although Rogers had no experience with managing a liquor store, Rogers is a very good business person and was the best candidate for the job. Rogers sold the bagel/coffee businesses and began employment eleven months ago.

On the day that is the basis for this matter, Pat Rogers was working alone in the liquor store at approximately 8:00 p.m. Rogers acknowledges selling a bottle of liquor to Professor Erik Tolefson, a retired Midstate University Professor of Norwegian studies and philosophy. Rogers said Tolefson did not appear intoxicated. Midstate University Police Chief, M.J. Troy, watched Tolefson when he entered the liquor store and thought Tolefson was drunk.

After Tolefson left the store, Troy administered three field sobriety tests to Tolefson.¹ Troy asked him to perform: (1) the walk-and-turn test—he staggered and nearly fell on turning, (2) the one-leg stand—he could not stand on one leg and (3) Horizontal Gaze Nystagmus (HGN)—Troy held an index finger about a foot in front of Tolefson's eyes and asked Tolefson to follow Troy's finger with his eyes as Troy's finger moved right to left and back slowly. Tolefson could not follow Troy's finger with his eyes. Tolefson failed the sobriety tests.

¹ **Field Sobriety.** The three field sobriety tests that comprise the Standardized Field Sobriety Test (SFST) battery are: (1) the walk-and-turn test, (2) the one-leg stand test, and (3) the Horizontal Gaze Nystagmus test. The Horizontal Gaze Nystagmus (HGN) is used as an indicator of intoxication as the eye movements of a sober person differ greatly from those of an impaired person. Nystagmus is a naturally occurring phenomenon of the eyes; drugs and/or alcohol increase or exaggerate the twitching or jerking of the eyes.

Once the officer determines the suspect does not have a medical condition that would affect the eyes, the officer conducts the HGN test. A penlight or even a finger is tracked in front of the suspect's eyes—about one foot distant—and the suspect is asked to follow the light or finger with the eyes.

The examiner is looking for three indicators of impairment in each eye: if the eye cannot follow a moving object smoothly, if jerking is distinct when the eye is at maximum deviation and if the angle of onset of jerking of the eyeball, instead of smoothly tracking, is within 45 degrees of center. If, between the two eyes, four or more clues appear, the suspect likely has a BAC of .10 or greater.

<http://www.horizontalgazenystagmus.com/horizontalgazenystagmustests.html> and

<http://www.nhtsa.dot.gov/people/injury/enforce/nystagmus/hgntxt.html>

Troy also administrated a Preliminary Breath Test (PBT)² to Tolefson and learned he had a .12% blood alcohol level.

After reviewing Troy's report, the president of Midstate University fired Rogers. The parties agreed the issue is whether the employee was discharged for just cause. The Union has filed a grievance in this matter on behalf of Pat Rogers. The Union has requested an expedited arbitration hearing pursuant to Article 28 of the Collective Bargaining Agreement.

ISSUES RAISED

(These issues do not limit participants. Other appropriate issues may be raised.)

- A. Whether the employee was discharged for just cause
- B. Just cause for discipline
- C. Just cause for extent of discipline
- D. Progressive discipline
- E. Remedies in Arbitration
 - Termination
 - Suspension
 - Reinstatement with or without back pay
- F. Reasonableness of the procedure for termination and the application to this employee
- G. Sufficiency of the notice of the rule
- H. Past practices

THE WITNESSES

(The Witnesses May Be Male or Female)

Unless otherwise advised, the parties may not call any of other parties' witnesses in their case in chief.

EMPLOYER

Police Chief, M.J. Troy

Midstate University President, D. Laterno* (*only call as witness at instructor's direction)

EMPLOYEE AND UNION

Pat Rogers

² **Preliminary Breath Test (PBT) Reliability.** In general, chemical tests such as breath analysis are considered reliable scientific methods of determining intoxication and the results of such tests are generally admissible to prove intoxication. However, the results of preliminary breath tests (PBT) are not admissible for that purpose, but only to show the existence of probable cause for arrest. The test is given at the scene of a traffic stop to determine whether the blood alcohol concentration is sufficient to support an arrest. A chemical test to determine intoxication has been said to be considered a reliable scientific method, the validity of which is not open to serious objection.

Preliminary breath tests are inadmissible and cannot be used as evidence to prove someone is intoxicated. The results of a preliminary breath test provide a reasonable cause of belief that the defendant is under the influence of alcohol, and such results may be used to determine whether more accurate testing is appropriate, and thus may be admissible for the limited purpose of showing probable cause for arrest.

A preliminary breath test may be given as a field sobriety test upon a police officer's "reasonable articulable suspicion" that a person has violated a statute prohibiting driving while impaired. The officer must have "reason to believe" from a person's manner of driving that the driver may be violating the impaired driving laws.

The officer's reasonable suspicion may include their subjective opinion based on observation and perception, including the odor of alcohol, slurred speech, loss of balance or dexterity or any number of observable factors such as improper driving, a tip from a reliable source, or the admission of alcohol consumption.

Preliminary breath screening test results are admissible in prosecutions as evidence in a civil proceeding. Although the evidence is supposedly admissible on a motion to suppress in a criminal case, it may not be used in the criminal trial itself. Giving a preliminary breath test does not foreclose other tests under the implied consent law.

EMPLOYER

Midstate University

Midstate University was founded in 1900 as an agricultural and liberal arts institution and is located in Silver Springs, the second largest city in NITA. The University's location enhances the traditional classroom experience by providing students greater opportunities in resources, contacts with business and government leaders, employment, and internships.

With an enrollment of more than 22,000, Midstate University prides itself on specialized attention to each student. Although the University's students come from almost every state in the United States and 120 foreign countries, 55 percent are from NITA, and represent nearly all counties in the state. Midstate University offers B.A., B.S., M.A., M.S. and Ph.D. degrees in 75 different courses of study. Midstate College of Law, an affiliate of Midstate University, offers both an LL.M. and a J.D. degree.

The 200-acre campus is modern and accessible and at the same time retains the flavor of the University's 100+ year heritage. More than 50 pieces of sculpture by internationally known artists adorn the campus. During the past 20 years, Midstate University has more than doubled its instructional space, adding major buildings for art, engineering, health sciences, biological sciences, physical education, music, dance, and liberal arts and sciences. Approximately 120 social and special interest clubs provide opportunities for students to meet and work with others who share their interests. Ten national sororities and ten national fraternities are active on campus. Midstate University is a Division I institution and has teams in tennis, cross-country, basketball, track, football, soccer, golf, bowling, crew rowing, men's baseball and women's volleyball and softball. The men's and women's bowling teams have won numerous national championships. The University's mascot name, the "Schooners," reflects the national heritage of the heartland—the Prairie Schooners (covered wagons) that brought settlers across the country to settle the nation.

MSU has 479 full-time faculty and 41 part-time faculty. Of the total, 73 percent have earned the highest degree in their field. Of all undergraduate credit hours, 62 percent are taught by full-time faculty. The average age of the faculty is 54; 56 percent of the faculty are males and 44 percent are females.



Police Chief M.J. Troy

Age: 35.

Married: Married, 3 children.

Education: B.S. Degree in Police Administration, Midstate University, ____ (Year -13).

Post Graduate work in Business Administration, Portland University, ____ (Year -11).

Employment:

- Police Officer, Portland, Oregon, ____ (Year -13) to ____ (Year -11).
- Police Officer, Midstate University, ____ (Year -10) to ____ (Year -6).
- Midstate University Chief of Police, ____ (Year -6) to ____ present.

Additional achievements:

- Teaches courses and seminars at Midstate University and to the NITA Bar Association on Alcohol Enforcement and Policies.
- Articles published: “Spotting the Drunk Driver” and “Drinking Yourself to Death,” both published in the NATIONAL POLICE OFFICERS MAGAZINE, ____ (Year -2).

D. Laterno

Age: 53, born Dec. 23, ____ (Year -53).

Married: Married, no children.

Education: B.A., Economics, Louisiana State University, ____ (Year -21).

M.B.A., Harvard University, ____ (Year -19).

Ph.D., Business Administration, Harvard University, ____ (Year -16).

Employment:

- Associate Professor of Marketing, Midstate University, ____ (Year -16) to ____ (Year -10).
- Professor of Marketing and Finance, Midstate University, ____ (Year -10) to ____ (Year -8).
- Acting Dean, College of Business, Midstate University, ____ (Year -8) to ____ (Year -6).
- Dean of Business College, Ball State University, ____ (Year -6) to ____ (Year -3).
- President, Midstate University, ____ (Year -3) to ____ present.

Publications:

Thesis: *Business and Education—An Educational Conundrum*, ____ (Year -16).

Alcohol and Money: A Dangerous Mix on University Campuses, ____ (Year -5).

Managing a Stressed University—NATIONAL EDUCATION FORUM, ____ (Year -2).

Alex Margolis (Not available as a witness)

Age: 32, born July 15, ____ (Year -32).

Married: Married, two children.

Education: B.S. Business and Accounting / Human Resources, Midstate University, ____ (Year -10).

M.B.A., Human Resource Management, Lincoln University, ____ (Year -4).

Employment:

- Associate Director of Human Resources, Lincoln University, ____ (Year -10) to ____ (Year -7).
- Assistant Director of Human Resources, Lincoln University, ____ (Year -7) to ____ (Year -2).
- Director of Human Resources, Midstate University, ____ (Year -2) to present.

John Marden (Not available as a witness)

Age: 26, born Jan. 2, ____ (Year -26).

Married: Single.

Education: B.A., English, West Hills University, ____ (Year -4).

Employment:

- Midstate University, Assistant to the President, ____ (Year -2) to ____ (Fri., Week -3).

Professor Erik Tolefson (Not available as a witness)

Age: 71, born March 2, ____ (Year -71).

Married: Wife: Ingrid, 5 children, 11 grandchildren, 3 great-grandchildren.

Education: Doctorate Degree in Norwegian Studies and Philosophy from the University of Oslo, Oslo, Norway, ____ (Year -43).

Employment:

- Professor of Norwegian Studies and Philosophy at Midstate University from ____ (Year -40) to ____ (Year -2) (now retired).
- Volunteer Greeter/Dosa at the Sons of Norway Museum.
- Volunteer Gardener at the Horticulture Society's Peace Gardens.
- Volunteer Norwegian Language Instructor for Elementary Students.

Publications:

Norwegian Songs and Poetry from the Fjords

Clashing Scandinavian Philosophies

Theoretical Studies on the Native Sami Culture of Norway

Botanical Guide to Torsdala and the Lillehammar Region

EMPLOYEE AND UNION**State Professional Employee Union (SPEU)**

In ____ (Year -5), a budgetary crisis in the state brought new concerns to the state professional employees relating to job security and decline of service to clients. A newly formed State Professional Employee Union (SPEU) broke away from the American Association of State, County and Municipal Employees (AASCME) and the Midstate University Union of Teachers and Employees (MUUTE). Both organizations previously represented professional employees working for state agencies, schools and universities directed and funded by the State of NITA.

The Union (SPEU) represents 950 Midstate University employees.

Pat Rogers

Age: 35, born October 31, ____ (Year -35).

Married: Spouse deceased. Twin daughters, Sheri Lynn and Mary Rose, age 6½ years old.

Education: B.A., History, University of Wisconsin, ____ (Year -13).

M.B.A., Business Management, Midstate University, ____ (Year -11).

Employment:

- Clerk, White Wolf Coffee Shops, Inc., ____ (Year -13) to ____ (Year -12).
- Asst. Store Manager, White Wolf Coffee Shops, Inc., ____ (Year -12) to ____ (Year -11).
- Store Manager, White Wolf Coffee Shops, Inc., ____ (Year -11) to ____ (Year -9).
- Owner/Operator/Manager, The Coffee Shop and Bakery, (single shop), ____ (Year -9) to ____ (Year -7).
- Owner/Operator/Manager, The Coffee Shop and Bakery, (four coffee shops), ____ (Year -7) to ____ (Year -1).
- Off Campus Liquor Store, ____ (First Monday, Month -9) to ____ (Month -5).

PARTY AND WITNESS DEPOSITIONS AND/OR STATEMENTS

The letters, statements and reports are comprised of information provided by witnesses, and have been adopted by them as true and correct. Accordingly, they may be used as is appropriate under the rules of evidence. When testifying each witness may only add non-substantial facts which are consistent with the case file. Significant substantive facts may not be added.

EXHIBITS AND DOCUMENTS

The exhibits and documents are all authentic. Witness testimony provides both legal and persuasive foundation for exhibits. The exhibits may be marked separately (i.e., Exhibit 1, Exhibit 2, etc.). If the exhibit has more than one page, the first page of the exhibit can serve as the exhibit number and the number of pages contained in the exhibit can be found at the top of the page.

All exhibits should be offered for admission and be received into evidence before the exhibit can be used. The rules of evidence apply in regard to admission of exhibits.

THE FACTS

DETAILED TIME LINE OF SIGNIFICANT DATES

Month -12

- 1st Monday Wongs give Off Campus Liquor Store to Midstate University.

Month -11

- 1st Monday Off Campus Liquor Store ad for manager runs.
- 2nd Monday Pat Rogers applies for Off Campus Liquor Store manager's job.
- Last Thursday Letter from hiring from Alex Margolis.

Month -9

- 1st Monday Rogers begins employment at Midstate University's Off Campus Liquor Store.

Month -3

- 1st Monday Rogers' six-month job review.

Week -6

- Friday Rogers sells liquor to Tolefson.
- Friday Initial Report of M.J. Troy regarding Tolefson.

Week -5

- Monday Letter from Rogers to Laterno hoping not to be fired.
- Wednesday Letter from Laterno to Rogers firing Rogers.
- Friday Metropolitan News article regarding Rogers.

Week -4

- Monday State Public Employee's Union (SPEU) files Grievance on behalf of Pat Rogers
- Tuesday Letter from Rogers to Laterno—angry about being fired.
- Friday Letter from Laterno to Rogers refuting statements in news article.

Day -10

- Follow-Up Police Report from M.J. Troy.

Day -9

- Letter from Pat Rogers to Union advocate explaining what happened.

Day -8

- Letter from Laterno to law firm representing Midstate University explaining what happened.



January 15, ____ (**Year -5**)

TO: All Midstate University Employees

FROM: Lester Evansvold, Midstate University President and
Francis Jilek, State Professional Employee Union (SPEU) President

We are pleased to announce after taking the vote, the State Professional Employee Union (SPEU) now represents all non-faculty employees of Midstate University. Midstate University and SPEU have ratified the Collective Bargaining Agreement effective as of this date. The Collective Bargaining Agreement is attached.

Attachment: Collective Bargaining Agreement

COLLECTIVE BARGAINING AGREEMENT

(Page 1 of 2)

**Article 28 - Collective Bargaining Agreement between
Midstate University and State Professional Employee Union (SPEU)**

Adopted January 15, ____ (Year -5)

[The Agreement has been edited for this Exercise.]

A. Nothing in this Agreement is intended to circumscribe or modify the existing right of Midstate University to:

- (1) direct the work of its employees.
- (2) hire, promote, assign, transfer and retain as to position with the Company.
- (3) demote, suspend, reduce in pay or discharge employees for just cause.
- (4) maintain the efficiency of company operations.
- (5) take actions as may be necessary to carry out the mission and vision of the Company.
- (6) determine the methods, means, and personnel by which operations are to be carried on.
- (7) develop and implement reasonable* rules of employment including schedules and time keeping.
- (8) promulgate reasonable* reporting and record keeping obligations and procedures in policies adopted under the Collective Bargaining Agreement.

**Reasonable: being in accordance with reason; not extreme or excessive; moderate and fair, and possessing sound judgment.*

B. Disciplinary actions may, at the employer's discretion, include warnings, suspensions and discharges. Any employee disciplined or discharged shall be entitled to file a grievance through the Employee's Union within thirty (30) days of written notification of discipline. The grievance must set out the basis for the grievance. If requested in writing by the Union, an expedited hearing will be held with the Union within thirty (30) days of the Disciplinary Action or Discharge Violation.

- 1. Violation of critical work rules.** Critical work rules are defined as rules that endanger health or safety. A violation of a critical work rule may subject the Employee to immediate termination.
- 2. Violation of non-critical work rules.** Non-critical work rules are defined as rules that do not endanger health or safety.

Steps to Discipline:

Step 1: A first violation. When an Employee violates a non-critical work rule, the Employee shall receive an oral notice. Verification of this oral notice shall be placed in writing in the Employee's personnel file.

Step 2: A second violation. Employee shall receive a written reprimand to be placed in the Employee's file. The Employee shall meet with the Human Resources Director.

Step 3: A third violation subjects the Employee to a written reprimand and a suspension without pay for up to 30 days. The Employee and the Union Steward may meet with the Human Resources Director prior to the enforcement of the suspension.

Step 4: A fourth violation of a non-critical work rule will subject the Employee to the immediate termination of employment. The basis for the discipline, including termination, must be set out in writing and must state all grounds for the discipline. The written notice of discipline must be provided to the Employee and the State Professional Employee Union (SPEU) representing the Employee.

COLLECTIVE BARGAINING AGREEMENT (Page 2 of 2)

C. The Parties to the Collective Bargaining Agreement may agree that this matter may be resolved through negotiation or mediation. Absent such an agreement, the matter will be resolved through arbitration. However, when an Employee is terminated the Employee may elect to have the matter heard by a judge or jury. (See E. below.)

D. **Arbitration**

- Burden of Proof: The Employer shall have the burden of proof by a preponderance of the evidence that there was just cause for discipline of the Employee and just cause for the degree of discipline.
- Disciplinary arbitrators shall render determinations of a violation of work rules and the appropriateness of proposed penalties, and shall have the authority to resolve a claimed failure to follow the procedural provisions of this Agreement. Disciplinary arbitrators shall neither add to, subtract from, nor modify the provisions of this Agreement. In an arbitration, the Employee may be terminated, suspended or reinstated with or without back pay. Additional damages are not available in an arbitration.
- The Employee (grievant) shall be represented by the Union.
- The Employer shall present the first opening statement and the concluding final argument.
- The Employee (grievant) shall not have a rebuttal final argument.
- The arbitrator shall determine the Rules of Evidence that shall apply.

E. **Trial To Judge or Jury:**

- If an Employee is terminated, the Employee may elect to have the matter heard by a judge or jury.
- The Employee must notify the Employer in writing of this election within thirty (30) days of the Employee's termination. If the thirtieth (30th) day falls on a Saturday, Sunday or legal, national or state holiday, the thirtieth (30th) day shall be the next full work day.
- Upon election to try the matter to a judge or jury, the Employee must file a complaint in state court within thirty (30) days of this election.
- The Employer must file an answer within thirty (30) days of receiving notice of the complaint.
- The Union shall not be required to represent the Employee in a trial. (The Union may choose to represent the Employee.)
- Burden of Proof: The Employee shall have the burden of proof by a preponderance of the evidence that there was insufficient cause for termination.
- In a trial to a judge or jury, the Employee may seek damages in addition to the remedies provided by the Collective Bargaining Agreement. The Employee has the burden of proving damages by a preponderance of the evidence.
- The Employee shall be the plaintiff and the Employer shall be the defendant.
- The Employee shall present the first opening statement and the concluding final argument.
- The Employer shall not have a rebuttal final argument.
- The Employee must present evidence first.
- The Rules of Evidence, Procedure and Law of the jurisdiction where the complaint is filed shall govern but shall not amend any terms of this agreement.

F. **Discovery Depositions**

- The Employer and the employee may take discovery depositions of witnesses or parties.
- The depositions are limited to three per side.
- A deposition of a witness or a party may not exceed thirty (30) minutes.
- Upon written application and with good cause shown, the thirty (30) minute time limit for taking a deposition and the number of persons to be deposed may be increased.

METROPOLITAN NEWS

L. Marie, Publisher—John Oliver, Editor

In the News:

Weekend “Knit-A-Thon” at the Springs Mall Produces 933½ Pairs of Socks for Homeless and Soldiers

Silver Springs Attorney Accidentally Sues Himself On Land Deal

_____ (First Monday, Month -12)

University Sells Soul for Alcohol Money

Midstate University President, D. Laterno, announced today that Midstate University graduates Martin and Julia Wong made a substantial gift to the University—the Off Campus Liquor Store. The Wongs, who have been successful in a number of business enterprises, told Metropolitan News they wanted to give back to the University, and that they were concerned the Legislature had cut programs for minority students. The Wongs said they could not have attended college without programs similar to ones recently cut by the Legislature. Laterno, announcing the Wongs’ gift, which would likely give the University at least \$1 million annually, said the University welcomed the gift and believed it would provide important benefits to the University and its students. The Wongs and Laterno said they were shocked to learn of negative reactions from students, faculty, and parents to the Wong’s gift.

Laterno acknowledged some recent problems with alcohol on campus and was aware that the managers of Wongs’ liquor store had not been responsible. Laterno said that with strict rules and consistent enforcement, the University expected few, if any, problems in the future.

John and Anna Becklund, parents of James Becklund, a first-year student who died of an overdose of alcohol at a fraternity party last year said they were stunned that the University accepted “liquor money.” Mrs. Becklund said that the University should never accept liquor money, even if the programs it would support “were the most wonderful in the world.” She called the Wong’s gift “the Devil’s money.” Mr. Becklund agreed with his wife and said, “The University has sold its soul for alcohol money.”

The Wongs said they were confident the details of the gift could be worked out and that the University would be able to accept their gift with their restrictions. Those restrictions prohibit the University from selling the liquor store once it has been accepted and require that all net profits from its operation, in recent years more than \$1 million annually, be used to develop or continue outreach programs assisting minority persons to compete for University admission and to complete their education. ‘One unnamed source told Metropolitan News there would be continuing protests if the University accepts the gift.

METROPOLITAN NEWS

L. Marie, Publisher—John Oliver, Editor

In the News:

Newly Camouflage Painted Army Reserve Truck Disappears—Search Underway in Cold Creek Forest

Red Tape Holds Up New Bridge Spanning Springs Creek

_____ (Second Monday, Month -12)

Opponents of Liquor Store Gift: Shame on ‘U’!

“Midstate University sold out for the almighty dollar,” said Sarah Lincoln and James Oliver, co-chairpersons of Students Against Drugs and Alcohol (SADA), a student organization formed to prevent alcohol and drugs on campus and to promote responsible behavior among students. In a desperate attempt to make up for cuts in appropriations by the Legislature, the University accepted a liquor store as a gift located just off campus. The store was given to the University by a wealthy alumni couple for the purpose of supplying money for minority affairs programs that were cut by lack of legislative funding. “While this may sound like a good idea at first glance, it is just a desperate attempt to salvage programs cut by the Legislature,” Lincoln said.

The University has recently experienced serious problems with drinking on campus, drinking by underage persons, and binge drinking. In the last three years, three students died from alcohol-related problems, two in car accidents and one from an overdose of alcohol at a fraternity party on campus. “Sometimes we have to stop and think. What kind of message are sending to our children?” asked the mayor of the city, Andrew Peters. University President Laterno responded, “We understand how some may think

we are giving the wrong message. However, the University has instituted strict policies against drinking. As we all know, drinking itself is not illegal. Abuse of alcohol is the problem. We can never stop the drinking, but we can teach our students to be responsible.”

“The gift of Mr. and Mrs. Wong came at a time when money problems forced the Legislature to cut significant programs,” Laterno said, “and income from the liquor store will permit the University to reestablish programs that will assist the University, its students and our community.”

Laterno continued, “We will establish strict rules for the liquor store to assure there will be no violation of any laws or University policies.”

A coalition of campus organizations, churches, and political organizations plans to protest the University’s action in accepting the Wongs’ gift. Marlys Masterson, a spokesperson for the coalition said, “There has to be another way to keep these programs. Good programs should never be funded by booze money.”

METROPOLITAN NEWS

L. Marie, Publisher—John Oliver, Editor

_____ (First Monday, Month -11)

Advertising Section

Want Ad

Manager Wanted

Midstate University seeks experienced, responsible retail business manager to direct its liquor store operation. This University-owned business was donated to the University on the condition that all proceeds be used for minority affairs programs. The University, committed to its zero-tolerance campus alcohol policy and to enforcement of restrictions on the sale and misuse of alcohol, seeks person of demonstrated responsibility to operate this business. Starting salary is in the mid-50's, with potential for bonuses and salary growth. Attractive health care and retirements plans included. As a manager in the University system, employee will receive a three-quarters tuition waiver in the University educational system (including our K-12 school) for children of employee.



Applications should be directed to:

Department of Personnel

Midstate University

10500 Campus Drive

Silver Springs, NITA

Midstate University is an equal opportunity employer.

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515
999-869-9053

_____ (Second Monday, Month -11)

Midstate University
Department of Personnel
10500 Campus Drive
Silver Springs, NITA

Dear Administrator,

Please accept my application for the position of manager of the liquor store operation owned by the University. I am well aware of the controversy surrounding the gift of the liquor store to the University. I too, am concerned about the abuse of alcohol by young people and the problems that abuse has led to on our University campuses. However, this gift provides resources that are vital to the growth of our University offering more opportunities to those who may not otherwise be able to obtain a University education. With careful management and close attention to standards and rules, I believe the liquor store operation can be run appropriately and will not become a liability for the University or its students.

I have extensive experience in management and in working with young people who are often employed in the coffee house business. My experience will serve the University well if I am hired as the manager of the liquor store operation. I look forward to the opportunity to interview for this position.

Sincerely,

Pat Rogers

Pat Rogers

_____ (Second Monday, Month -11)

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515
999-869-9053

Education Bachelor's Degree in History, University of Wisconsin, ____ (Year -13).
MBA Business Management, Midstate University, ____ (Year -3).

Job History Employee of White Wolf Coffee Shops, Inc., ____ (Year -13) to ____ (Year -12).
Assistant Store Manager, White Wolf Coffee Shops, Inc., ____ (Year -12) to ____ (Year -11).
Store Manager, White Wolf Coffee Shops, Inc., ____ (Year -11) to ____ (Year -9).
Owner/Operator/Manager of The Coffee Shop and Bakery, Inc., (single shop), ____ (Year -9) to ____ (Year -7).
Owner/Operator/Manager of The Coffee Shop and Bakery, Inc., (four coffee shops), ____ (Year -7) through ____ (Year -1).

Management Experience 80 employees - The Coffee Shop and Bakery, Inc. includes part-time and full-time store employees, two person secretarial staff, six assistant managers, and business manager.

Volunteer and Community Activities

- Member and Vice-President for Chamber of Commerce. As a member of the Chamber of Commerce, I donate all leftover baked goods from my bakery at end of each business day to homeless shelters.
- Member of Habitat for Humanity.
- Member of Greenpeace.
- Volunteer reader at Northcrest Elementary School.



Midstate University

10500 Campus Drive
Silver Springs, NITA 55515

_____ **(Last Thursday, Month -11)**

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515

Dear Pat Rogers,

Following up on my phone call to you yesterday, I am pleased you will accept our job offer. It was a pleasure to meet with you two weeks ago. As you know, we received many qualified applicants for the position as manager of the University's liquor store operation. We are delighted to offer you the position. You were, by far, the best candidate for the job. Your experience and sensitivity to the issues will serve the University and its students very well. University President, D. Laterno, has been informed of our decision and is happy you have decided to come onboard at the University.

As I stated to you, your starting salary will be \$55,000. You will have opportunities for increases and promotions within the University management system.

In response to some of the questions you asked me yesterday, you and your family will receive full health and dental coverage on the day you start with us. Your retirement will vest at the end of your six-month probationary period. As soon as you come to work, your two children will be able to enroll tuition-free in the University laboratory-elementary school and should you remain employed with the University, your children will receive 3/4 tuition waivers through high school. If your children qualify academically for attendance at the University, they will receive 3/4 tuition waivers for the four-year undergraduate program at the University.

I understand that it will take a month for you to wind down your business operations, therefore we will look forward to you starting on the job on _____ **(First Monday, Month -9).**

I have enclosed the special Rules of Employment and Management of the Off Campus Liquor Store. These Rules were adopted under the provisions of the Article 28 of the Collective Bargaining Agreement between Midstate University and the State Professional Employee Union (SPEU). They were approved by me and Union Steward, Margaret Harmon.

Sincerely,

Alex Margolis

Alex Margolis
Director of Personnel
Midstate University

**RULES OF EMPLOYMENT AND MANAGEMENT OF
THE OFF CAMPUS LIQUOR STORE**

*Developed in accordance with the Collective Bargaining Agreement, Article 28 between
Midstate University and State Professional Employee Union (SPEU)*

Adopted ____ (Month -11)

[The Rules have been edited for this Exercise.]

Rule 6: Sale of Alcohol to Minors or Intoxicated Persons

- No alcohol will be sold to an underage person.
- Employees are required to obtain identification of anyone who is not clearly of a legal age.
- No alcohol can knowingly be sold to a person who is intoxicated.
 - Intoxicated is defined to mean anyone over .08% blood alcohol.
 - Knowingly is defined as: knowing or should have known the buyer was intoxicated.
- A violation of any provision of Rule 6 is a violation of a Critical Work Rule under Article 28, B (1) of the Collective Bargaining Agreement (CBA) and the employee is subject to immediate termination.
- An employee terminated under the provision of Rule 6 and Article 28 of the Collective Bargaining Agreement (CBA) will lose all University benefits except for accrued and vested retirement funds.

Approved under Article 28 of the Collective Bargaining Agreement between Midstate University and the State Professional Employee Union (SPEU) that was adopted, ____ (Year -5).

Alex Margolis

Alex Margolis

Director of Personnel, Midstate University

Margaret Harmon

Margaret Harmon

Union Steward SPEU, Local #1234



**MIDSTATE UNIVERSITY
SIX-MONTH PROBATIONARY PERIOD JOB REVIEW**

_____ **(First Monday, Month -3)**

Subject: Pat Rogers
Position: Manager of the Off Campus Liquor Store
Starting Date: _____ **(First Monday, Month -9)**
Evaluator: Alex Margolis
Recommendation: Retention as employee

I have spoken to Pat Rogers, interviewed employees, looked at the management and financial records of the Off Campus Liquor Store and determined the following: Pat Rogers is an excellent financial manager. Rogers has exceeded all financial projections for the operation. Rogers is a good personnel manager. Some of the employees who worked at the store before Rogers took over as manager were concerned with the strict rules that were imposed. The employees were not specific. I believe that some of their concern was due to a change in management style. However, this is something we may have to address later. Of more concern is Rogers' work with other managers within the system. Rogers seems to be somewhat of a loner and may not be perceived as a team player. Rogers showed impatience at the bi-weekly management team meetings and the monthly one-on-one meetings with supervisors. Rogers said on a number of occasions that the meetings got in the way of work on the job. Rogers has to understand the importance of team work and how various insights of all management personnel can improve the University system as a whole. Part of the problem may be the independence Rogers experienced as a small business owner and the difficulty Rogers has assimilating into the larger bureaucracy of the University.

Nevertheless, I highly recommend retention. Rogers is a valuable addition to our management team.



MIDSTATE UNIVERSITY POLICE DEPARTMENT

Incident Report

_____ (Friday, Week -6)

TO: File
FROM: Midstate University Chief of Police, M.J. Troy
RE: Pat Rogers

Following a conversation yesterday with University President, D. Laterno, I scheduled myself to conduct a stake-out of the Off Campus Liquor store located just off campus on 9191 Campus Drive. As we discussed, there have been a number of rumors concerning the sale of liquor to under age people at the liquor store. Following Laterno's instruction, I observed the store to see if there were any violations of the campus policy. I understood how important it was to the University that there were no liquor violations at the store.

I positioned myself in the window of Miller's Deli and Coffee Shop directly across from the liquor store on Campus Drive. I began my surveillance at 6:00 p.m. From 6:00 p.m. until 8:00 there was a steady stream of customers entering the store. I did not observe anyone enter the store who appeared to be under age. There were two employees in the store, one of whom I later identified as Pat Rogers. At 7:45 p.m. the second employee left the store as there appeared to be a lull in business. The second employee came over to Miller's Deli and Coffee Shop and had a free range organic, all natural turkey and sprout sandwich on whole wheat bread and a double latte with the house blend and double sugar.

At 8:00 p.m. I observed an older man walking from the East up the sidewalk on Campus Drive. The man appeared to be disheveled and unkempt. He was very unsteady on his feet. He was wearing a dirty blue work shirt, a red bandanna around his neck and a pair of soiled, pleated khaki pants. He was wearing very dirty unlaced tennis shoes. *(If the climate in your area requires the wearing of a coat add the following: Tolefson was wearing a dirty, blue, quilted ski jacket.)* I later learned this man was Erik Tolefson, a retired professor of Midstate University.

I watched Tolefson stagger to the door of the liquor store. He paused at the door for a few seconds and entered. He walked directly to the counter and stood in front of Rogers. I could not hear what they said but I could see both of them clearly through the full, plate glass window.

Tolefson did not stagger inside the store and was inside only for a short time. When he left, he was carrying a sack containing a bottle of GlenLucy single malt whisky and a receipt for the sale.

Tolefson was carrying a paper bag containing a receipt and a bottle of GlenLucy single malt whisky when he came out of the store. He was not carrying a bag when he entered the store. I then seized the bag from him. I took photographs of the receipt, the sack containing the whisky and the bottle of GlenLucy.

I approached Mr. Tolefson and asked him if he had been drinking. He said, “You’re darn tootin’, my good fellow and I suggest it isn’t any business of yours.” We discussed the weather and I observed that Tolefson was slurred of speech, his breath smelled of alcohol, his eyes were blood shot and he was unsteady on his feet. I asked him to perform three field sobriety tests: (1) the walk-and-turn test—he staggered and nearly fell on turning, (2) the one-leg stand—he could not stand on one leg and (3) Horizontal Gaze Nystagmus (HGN)—I held my index finger about a foot in front of Tolefson’s eyes and asked Tolefson to follow my finger with his eyes as my finger moved right to left and back slowly. Tolefson could not follow my finger with his eyes. Tolefson failed the sobriety tests. I administered a Portable Breath Test (PBT) and determined he had a .12% breath alcohol concentration.

I asked Tolefson for some identification and I noted that he fumbled for his wallet and had difficulty removing his driver’s license. Tolefson dropped his license and I picked it up for him. After recording Professor Tolefson’s address, I permitted him to leave.

I then went into the Off Campus Liquor Store and talked to Pat Rogers. I identified myself and asked Rogers if Tolefson had purchased any alcohol in the store. Rogers replied, “Yes.” Then I asked Rogers if Rogers had noticed Tolefson was drunk. Rogers said, “I have never met Tolefson before and he did not look drunk to me. He looked like a tired old man who may have been sleeping rough and who had a cold.”

I told Rogers that I would be making a report to the President of the University and since I believed there was a violation of the Employment and Management of the Off Campus Liquor Store, Rule 6—I expected Rogers would be terminated.

I contacted another squad car and the officers were instructed to take Tolefson home. Tolefson was not charged with any criminal offense.

I have attached the four photographs.

M.J. Troy

M.J. Troy, Chief of Police

11:30 p.m.

cc: D. Laterno, President Midstate University

**Photograph of Tolefson's Receipt
of Purchase from
Off Campus Liquor Store**

Off Campus Liquor Store	
9191 Campus Drive	
Silver Springs, NITA	
555-555-5555	
1L. GlenLucy Scotch Whisky	\$42.99
SUBTOTAL	\$42.99
@ 7% Sales Tax	\$3.01
TOTAL	\$45.99
Cash Tendered	\$50.00
CHANGE	\$4.01
Thank you for shopping at Off Campus Liquor Store Retain this Receipt for your Records	
Date: Friday, _____(Week -6)	
Transaction Ref. Number: 5432-5273-0602	
Salesperson: Pat	

Photographs of Tolefson's Bottle of GlenLucy in Bag



Photograph of Tolefson's Bottle of GlenLucy



Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515
999-869-9053

_____ (Monday, Week -5)

President D. Laterno
Midstate University
1500 Campus Drive
Silver Springs, NITA 55515

Dear President Laterno,

Last Friday, University Chief of Police M.J. Troy came into the liquor store and told me I had sold liquor to an obviously intoxicated person and a report of the violation was going to you. Chief Troy was very rude to me. Troy told me that there had been rumors about sales to under aged people and that the liquor store was under surveillance because there were rumors of liquor being sold to under age students. Troy told me I would probably be fired.

I did sell liquor to that old man. He looked to me to be a poor, tired old man. I thought he had been sleeping on the street and that he had a cold. I did see that his eyes were blood shot though I did not think he was drunk. He was in the store a short time and I did not talk to him for very long. I was surprised he bought such an expensive bottle of whisky and paid cash for it.

This job means a lot to me. I love working for the University. I know all the Rules of Employment of The Off Campus Liquor Store and of the employment contract I signed. I would never knowingly break any rules. I sold my other businesses in order to work for Midstate University and I am the only source of support for my two kids. The health benefits are very important to me. I hope you will not fire me.

Sincerely,

Pat Rogers

Pat Rogers



Midstate University

Office of the President
10500 Campus Drive
Silver Springs, NITA 55515

_____ (Wednesday, Week -5)

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515

Dear Pat Rogers,

I received a copy of Police Chief Troy's report dated Friday, _____(Week -6) and your letter to me dated the following Monday. Based on both documents, and after a full examination of the employment contract you signed and the Rules of Employment and Management of The Off Campus Liquor Store, specifically Rule 6, it is my unfortunate duty to inform you that you are immediately terminated as an employee of Midstate University. Your health benefits will continue for one month as of the date of this letter and you have earned one sick day and one vacation day. Payment for your sick days and your vacation days will be added to your final paycheck which includes your wages, up to and including, today.

Please clean out your office immediately upon receipt of this letter and vacate the premises!

If you wish to file grievance, you have thirty (30) days in which to do so pursuant to Article 28 of the Collective Bargaining Agreement between SPEU and Midstate University. I have attached your employment records. If you wish to see Midstate University records on this matter, please contact Alex Margolis, the Human Resource Director, and a copy of the records will be provided to you without cost. The grievance will be heard by an arbitrator. If you elect to have the matter resolved by a trial rather than by arbitration, see the terms and conditions of the Collective Bargaining Agreement.

You may keep the original of this hand delivered memorandum.

Please sign the copy of this letter so we can assure you have receipt of the notice of termination.

Sincerely,

Dr. D. Laterno

Dr. D. Laterno

I have received the original of this memorandum and understand I am immediately being terminated as an employee of Midstate University. I understand my rights to appeal this termination and submit the matter to binding arbitration and I am aware I may choose to bypass arbitration and have the matter heard by a judge or jury under Article 28 of the Collective Bargaining Agreement between Midstate University and the State Professional Employee Union (SPEU).

Pat Rogers

Date: _____ (Wednesday, Week -5)

Pat Rogers

METROPOLITAN NEWS

L. Marie, Publisher—John Oliver, Editor

In the News:

City Council Reports “Open Door” Meetings Are Now Closed

Police Composite Picture of Bank Robber Wearing Ski Mask, Sun Glasses and Lip Gloss To Be Released Soon

_____ **(Friday, Week -5)**

Liquor Store Manager Fired for Selling Booze

As predicted, the liquor store owned by the University got into trouble shortly after it began to operate under University management. Pat Rogers, the former operator of a chain of coffee and bagel shops, who was hired to manage the liquor store has been accused of selling liquor to an obviously intoxicated person. While Rogers had no prior experience in the liquor business, the University decided Rogers was the person for the job.

Midstate University Police Chief Troy said, “We heard all sorts of rumors about Rogers. We were informed that the store was poorly managed and was selling liquor to under age students and drunk people in violation of the employment contract and University policy. I conducted a stake-out and caught Rogers red handed.”

A source close to University President D. Laterno told Metropolitan News that Laterno had learned Rogers deceived the University about qualifications when applying for the job and heard from liquor store employees that Rogers was a terrible manager. Rogers was fired for violating University rules. In addition, the source said that Rogers was a trouble maker and not a team player.

The source said the University was misled into making a horrible mistake by hiring a hippy, coffee house, counter-culture weirdo.

The Union has filed a grievance against the University and it is expected there will be an arbitration or a trial to determine if the firing of Rogers was with just cause

Under the Union contract, SPEU will represent Rogers if the matter goes to binding arbitration. The issue is whether the University had just cause to fire Rogers. If it did, the arbitrator can uphold the termination. If there was not just cause, the arbitrator can require the University to reinstate Rogers with back pay. The terms of the contract also permit Rogers to elect to have a trial with a judge or jury.

The Metropolitan News has confirmed that the University has already hired a replacement. “The contract we have here is unique. Rogers can seek damages for unlawful termination regardless of the outcome,” a Union official declared. “However, a court battle could be long and hurtful for both Midstate University and Rogers.”



STATE PROFESSIONAL EMPLOYEE UNION

SPEU

Local #1234

75 Central Avenue, Suite 200, Silver Springs, NITA 55515

GRIEVANCE FORM No. E-69

Date: _____ (Monday, Week -4)

Name of State Employer: **Midstate University**

Union Member's Name: **Pat Rogers**

Home Address: **7044 Balsam Trail**

Phone Number: **999.869.9053**

City: **Silver Springs**

State: **NITA**

Zip: **55515**

Type of Claim: ☒ **Discharge** ☐ Suspension ☐ Pay Claim ☐ Seniority Violation ☐ Other

Description of Grievance

Contract Violation Alleged: The discharge was in violation of the Collective Bargain Agreement, including but not limited to Article 28, Rule 6, Rules of Employment and Management of the Off Campus Liquor Store.

Specific Facts of Contract Violation:

Employer alleges Employee Rogers, while employed as a manager of the Off Campus Liquor Store, knowingly sold alcohol to an intoxicated person on _____ (**Friday, Week -6**). Employer alleges this is a violation of a critical work rule under Article 28, B1 of the Collective Bargaining Agreement.

Employee denies these allegations.

Relief Sought: Reinstatement with full back pay, job classification prior to discharge and all other appropriate relief.

Article of Contract Violated: **Collective Bargaining Agreement, Article 28, and Rules of Employment and Management of the Off Campus Liquor Store, Rule 6**

Action Requested: **Reinstatement of job, with back pay and classification prior to discharge.**

Member: **Pat Rogers**

Steward: **Margaret Harmon**

Management: **D. Laterno**

This form is the sole possession of SPEU Local #1234. Only an authorized representative of SPEU Local #1234 has the right to withdraw or settle this grievance.

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515
999-869-9053

_____ **(Tuesday, Week -4)**

Dr. D. Laterno
President
Midstate University
10500 Campus Drive
Silver Springs, NITA 55515

Dear President Laterno,

I cannot begin to tell you how furious I am. You have taken away my job, my kids' future, and now my good name. I realize now that my hopes for a new life were just dreams. I was cheated by you and the University. I gave up a \$60,000 job and sold my businesses because the University wanted me to go to work immediately and I could not run the businesses and work for the University at the same time. I was able to sell my company and pay off my debts. I was also able to terminate the leases for my shop for \$10,000. I will never be able to restart the shops because a large chain of stores has recently moved into the area where my shops were located.

I planned for my kids to attend the University elementary, high school, and eventually Midstate University itself. The three-quarter tuition waiver was a wonderful benefit for me and my kids; I could never afford the \$5,000 grade school; \$10,000 high school; and \$20,000 college tuition otherwise. You took away our hopes. I now have no health care or retirement fund.

To add insult to injury, your office said those horrible things about me to the newspaper. I am referring to the Metropolitan News article dated, _____ **(Friday, Week -5)**. I have never been careless about my job. I never sold alcohol to any under age students nor have any of the employees. I have never done anything against the University and received only positive reviews from you as an employee. You never even gave me a chance.

How can you live with yourself? I cannot sleep and my kids are under terrible stress. I cannot make my house payment or even buy food. I am desperate.

I hereby inform you under Article 28 of the Collective Bargaining Agreement between Midstate University and the State Professional Employee Union (SPEU), I am electing to have this matter heard by an arbitrator.

Sincerely,

Pat Rogers

Pat Rogers



Midstate University

Office of the President
10500 Campus Drive
Silver Springs, NITA 55515

_____ (Friday, Week -4)

Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515

Dear Pat Rogers,

I am in receipt of your most recent letter. No one from Midstate University was authorized to make any of the statements in the Metropolitan News article you sent me dated _____ (Friday, Week -5). No one in my office or from the University said any of the things quoted by the Metropolitan News. I never made any of those statements attributed to me. You were terminated for one reason, for violating Rule 6 of the Rules of Employment and Management of The Office Campus Liquor Store—knowingly selling alcohol to an obviously intoxicated person.

I contacted our attorneys and informed them you have elected to have this matter heard in an arbitration under the terms of the Collective Bargaining Agreement between Midstate University and the State Professional Employee Union (SPEU).

Sincerely,

Dr. D. Laterno

Dr. D. Laterno
President
Midstate University



MIDSTATE UNIVERSITY POLICE

FOLLOW-UP REPORT

_____ (Day - 10)

Follow-Up Report

TO: The File

FROM: Police Chief M. J. Troy *M. J. T.*

Acting on the advice of the Advocate representing Midstate University, I am providing this follow-up report concerning the incident at the Off Campus Liquor Store on _____ (**Friday, Week -6**). This report is based on my field notes that I have discarded.

When I first saw Professor Tolefson, I paid particular attention to him. I immediately thought he was drunk and assumed he was heading into the liquor store. I thought if Tolefson bought a bottle of liquor at the Off Campus Liquor Store, it would be a violation of the Rules of Employment and Management of the Office Campus Liquor Store, Rule 6. That is the type of situation that President Laterno worried about.

After Professor Tolefson went into the store, he seemed to pull himself together and walked straight to the counter. I observed exactly where he stood. He was directly across from Pat Rogers. I briefly met Rogers once at a training session.

Three days after the incident I measured the width of the counter. It was 30 inches wide. Tolefson appeared to be standing right up against the counter and Rogers was about 6 inches from the back of the counter.

I timed exactly how long Tolefson and Rogers faced each other. I used the second hand on my watch and observed they faced each other for 66 seconds. After that, Rogers turned around and was busy getting a bottle from the shelf and putting it in a package.

Starting at the time Rogers rang up the sale until Tolefson turned and left the store, the time elapsed was 95 seconds. Rogers and Tolefson were facing each other for 66 seconds of this time with the cash register between them. I could see Rogers' lips move and occasionally from the side I could see Tolefson's lips move, too. Of course I could not hear what either of them said. From where I watched, they were about 70 feet away from me.

I did not see Tolefson stumble or stagger inside the store. I have attached a diagram that I recently prepared to this report. It shows the path of Professor Tolefson. While it is not to scale, it is accurate.

When the professor came out of the store, I seized a sack that contained the bottle of GlenLucy whisky and the receipt for the sale. The photographs of the receipt, the bottle in the sack and the bottle of GlenLucy whisky are accurate.

Inside the store the light was good, there was some soft music playing and there were no smells. Outside the store there was a slight breeze blowing and some traffic noise. I placed myself directly in front of Tolefson so I could be in the same position but further away than Rogers was inside the store. I also observed Tolefson for less time than Rogers did. Placing myself in the suspect's position is very important. After my observations, I administered the field sobriety and breathalyzer test to Tolefson.

I have received a great deal of training in alcohol enforcement. I was a street officer for two years in Portland, West-State and a police officer on the force at Midstate University for ten years before I became Chief of Police for Midstate University. I train my officers in alcohol enforcement because it is important to the University. I have written two articles about alcohol violations: "Spotting the Drunk Driver" and "Drinking Yourself to Death." Both were published in the NATIONAL POLICE OFFICERS MAGAZINE within the last two years.

I did not include this much detail in my original report as I usually use the report only to refresh my recollection of events. I write an average of two reports a day and perform a lot of administrative work. I have an excellent memory of this event.

From a distance of four feet I could see the following:

Appearance of the professor:

- Hair dirty and matted (there was a dead leaf with a small twig in his hair)
- Clothes filthy—dirt stains, torn pants at the knee, food stains on the blue work shirt
- Eyes very blood shot—could not see the whites as they were very red
- Eyes glassy and pupils dilated
- Wet greenish matter in the corners of his eyes and caked matter under his eyes
- Nose very red and running
- Tolefson licked the moisture from his upper lip twice as I stood in front of him
- Beard stubble
- Wet trousers—medium size wet stain at crotch—smelled of urine
- Dirty tennis shoes, untied

Smell

- Very strong smell of alcohol coming from his breath
- Body odor
- Dirt/earth smell
- Urine smell

Stance

- Swayed a few inches back and forth the whole time he was in front of me—I could not see this sway from where I was watching him inside the store—it appeared he could control it inside
- Feet spread wider apart than normal
- Fumbling for identification while he was getting out driver's license

Speech

- Very slurred—difficult to understand
- Tolefson did tell me (with difficulty) that he had been gardening in his year-round green house and when he finished he had some drinks. He said his wife was out of town so he decided to get what he called a “snoot full.” He said he drank single malt whisky. I asked him if he knew he had wet his pants and he said, “Of course you fool! Do you think I am completely out of control?” He said he had two cups of coffee and the whisky before leaving home and when he walked halfway to the liquor store he had to “make water.” He said something about his “gol darned” prostate. He tried to get to the store to use the toilet but didn't make it. He said it was one of the problems of getting old.

I instructed the training sessions concerning the University's alcohol and drug policies and the workshop on identifying people under the influence and methods to deal with them. My records show that Rogers attended a policy session, although I have no recollection of Rogers' presence. The class had about forty people in it.

I do remember Rogers at the next session, which was the workshop on spotting intoxicated people. I told the students to turn off their cell phones as I think it is rude when they ring in class. As the class started, Rogers' phone rang. I was irritated. Rogers interrupted the class and said, “I have to leave. My child is ill.” I told Rogers I understood the problem. Rogers apologized for the phone call and missing the class. We agreed the class could be made up the next time it was offered. However, the class was not offered again before Rogers was fired.



Pat Rogers
7044 Balsam Trail
Silver Springs, NITA 55515
999-869-9053

_____ (Day -9)

Union Advocate Representing Pat Rogers
75 Spring Hill Drive
Northfield, NITA

Dear Advocate,

After I met with someone in your office last week (I do not remember the person's name) I thought a lot about what happened the day I sold the bottle of GlenLucy whisky to the old man. I had been working very hard all day and was really tired. My children were sick the night before and I was worried about them. I gave the other clerk a break when there was a lull in business. That is when the old man came in. I did not see the man outside the store before he came in. I saw the man as he walked right to the counter. He did not stand real close to the counter but was about four feet from where I was. He did not say much. All I heard him say was, "Hey there, young one, I'd like to buy a liter of GlenLucy." That is all he said. He had a strange accent that I could not define.

I noticed he looked really tired and was dirty. His eyes looked blood shot and he looked like he had a head cold. His hair was unkempt and he had on a blue work shirt (*add blue ski jacket if climate requires*). I also saw he had a red bandanna around his neck. I did not pay any attention to his pants or shoes. We occasionally get a homeless person into the store. These poor people often live on the street. I do not think I should refuse them the right to buy liquor just because they might be poor and homeless. This is why I was surprised the man bought GlenLucy. I turned to get the bottle from the shelf behind me and put the bottle in a brown paper bag. When I turned around the man had placed a \$50 bill on the counter. I rang up the sale, put the receipt into the bag and gave the change to the man. He held his hand out for it and put the change in his pocket. When I gave him the change I noticed his hand had a small tremor in it. He took the bottle of whisky, said thank you and walked out of the store. He was in the store a very short time. I'm not sure how long, but no more than a couple of minutes.

He did not stumble or stagger inside the store. The man did not slur his speech when he talked to me and except for the strange accent I did not notice anything odd about how he spoke. I did not smell alcohol on his breath. He did smell like body odor and dirt. When he left, I saw the person talking to him. I learned later it was the Chief of Police, Troy. I thought they were friends as they were both kind of waving their arms and talking. I didn't pay any further attention to them after a few seconds. Before the other clerk left for break he had broken a bottle of Canadian whisky and had not completely cleaned it up before he left. There was a strong smell from the broken bottle which was about five feet behind the counter. I mopped up the spill after Tolefson left and before Chief of Police, Troy, came into the store.

I was really surprised when Police Chief Troy confronted me. I couldn't believe it. I have done a good job for the University. Neither I or anyone else in the store has broken any laws or violated any of the Rules of Employment and Management of the Office Campus Liquor Store. I know the liquor store is controversial and would not do anything to jeopardize my job or the University. I attended all but one of the three-hour monthly training programs after I was hired. The fourth program was about the problems of on-campus alcohol and drug use and explained the policies of the University. It was a good session conducted by Chief Troy and was very clear. Session five was supposed to cover identifying people who were under the influence of alcohol and drugs. We were going to have a workshop and see a film. Just as the session was about to begin, my cell phone rang. (I was embarrassed and Police Chief Troy was upset by the interruption.) My 14-year-old babysitter called and said my youngest child was vomiting, and I had to go home. I told Chief Troy and I agreed to attend the session the next time it was offered. It was not offered again before I was fired.

I am proud of the job I have done for the University and the fact that revenues are going to a program I feel strongly about. When the funding for programs was stopped and the affirmative action programs were decreased, many young people were denied an opportunity they deserved.

The University provided some training but I had to leave early because of a family situation. I had a good reason to leave and informed the instructor. When I ran my own business I was fair to everyone. Every employee had an equal shot with me. If a person had potential, I provided them training. I am a really good manager. I am not much of a drinker and have not had sufficient training in spotting people who have been drinking except for the University training I already mentioned above. The University never followed up with training. I am an employee doing the best job I can.

The University is using me as a scape goat. They are embarrassed about owning a liquor store. There is nothing illegal about selling liquor to people over age 21. The key is for people not to abuse it.

Why doesn't the University have the courage to stand up for a good employee like me instead of sneaking around "investigating?" I am bitter and angry. I need this job and the benefits it provides for me and my children. I think the University and Chief Troy are out to get me.

I know you will do an excellent job representing me and you will teach the University a lesson they will never forget.

Sincerely,

Pat Rogers

Pat Rogers

cc: D. Laterno



Midstate University

10500 Campus Drive
Silver Springs, NITA

_____ (Day -8)

TO: Law Firm Representing Midstate University
FROM: The Office of The President
Midstate University
Dr. D. Laterno, President
CC: M.J. Troy, Alex Margolis, P.T. Ferguson and Pat Rogers
RE: Termination of Pat Rogers for just cause

On Wednesday, ____ (Week -5), after an examination of all the records and files in this matter, I made the decision to terminate Pat Rogers as an employee of Midstate University. I do not normally become involved in personnel decisions but I did so this time because of the unique and serious circumstances surrounding this incident.

Approximately one year ago, the University was granted a liquor store as a gift, located near the campus of the University. This unique gift was provided by Mr. and Mrs. Wong, graduates of the University. They gave the gift because they felt the University was responsible for giving them an opportunity for an education and for their subsequent business success. This gift was particularly important to the University since Midstate University has been under considerable financial pressure for the last five years. The Legislature has continually reduced funding and many programs have been cut particularly programs for assisting minority persons competing successfully and completing University studies. The Off Campus Liquor Store has an annual net return of at least one million dollars. With the gift of the liquor store, the Wongs set two rules: 1) the liquor store could not be sold and 2) the annual proceeds must be spent to develop or continue programs to assist minority persons to compete and successfully complete a University education. The importance of the gift cannot be understated because of the cuts to affirmative action programs and the terminations of these programs due to lack of funding. This gift, however, was very controversial.

Over the last five years, use of alcohol by under aged students on campuses throughout the state, at both public and private schools, has reached serious levels. There have been three student deaths in the state attributed to alcohol. Binge drinking has become a serious problem and the University has passed strict rules about the use of alcohol on campus and by underaged persons. The newspaper, as well as some legislators, have been critical of the University's acceptance of the gift and the conditions. One headline read, "University Sells Its Soul for Alcohol Money."

Nevertheless, I made the decision to accept the gift. I believed that strict management rules could prevent abuse or problems at the liquor store. I worked with the University attorney to develop the Rules of Employment and Management of the Office Campus Liquor Store:

Rule 6: Sale of Alcohol to Minors or Intoxicated Persons

- No alcohol will be sold to an underage person.
- Employees are required to obtain identification of anyone who is not clearly of a legal age.
- No alcohol can knowingly be sold to a person who is intoxicated.
 - Intoxicated is defined to mean anyone over .08% blood alcohol.
 - Knowingly is defined as: knowing or should have known the buyer was intoxicated.
- A violation of any provision of Rule 6 is a violation of a Critical Work Rule under Article 28, B(1) of the Collective Bargaining Agreement (CBA) and the employee is subject to immediate termination.
- An employee terminated under the provision of Rule 6 and Article 28 of the Collective Bargaining Agreement (CBA) will lose all University benefits except for accrued and vested retirement funds.

Approximately nine months ago, the University hired Pat Rogers through its normal procedure. I read Rogers' application and job reviews prepared by Alex Margolis, the Midstate University Director of Personnel.

I read in Pat Rogers' application and resume an admission of being well aware of the controversy surrounding the gift of the liquor store to the University. Rogers expressed concern about the abuse of alcohol by young people and the problems of alcohol abuse on campuses. Rogers went on to say that the gift provides vital resources and that careful management and close attention to standards and rules the liquor store can be run appropriately and will not become a liability.

About two months ago, I heard rumors that alcohol was being sold to underage students at the Off Campus Liquor Store. On Thursday, ____ (**Week -6**), I met with Chief of Police, M.J. Troy and discussed the problem with Troy. I instructed Troy to observe the liquor store and see if there were any violations of the campus policy.

On Saturday, ____ (**Week -6**), Chief Troy personally provided me with a report of the occurrences of the previous day at the Liquor Store which stated that alcohol had been sold by Pat Rogers to an obviously intoxicated person. At my home on Saturday, ____ (**Week -6**), I discussed the matter with Chief Troy at length. I was provided with significant details concerning the sale of alcohol to the intoxicated person.

On Monday, ____ (**Week -5**), I received a letter from Pat Rogers providing a justification for the sale of alcohol to the intoxicated person.

I have examined the Rules of Employment and Management of the Off Campus Liquor Store, particularly Rule 6 stated above.

Normally employee discipline follows a four-step process with progressive discipline implemented by our Personnel Department. First there is an oral reprimand; 2) a written reprimand; 3) a written reprimand with suspension not to exceed four work weeks; and, 4) a written reprimand and termination. However, because of the special circumstances surrounding the Off Campus Liquor Store, particular rules were developed for employment and management of that liquor store. Because of the seriousness of this violation, sale of alcohol to an underaged person, or to an intoxicated person, demanded immediate termination without the steps of progressive discipline.

After a full review of the files, a complete understanding of Pat Rogers' employment records and the circumstances surrounding the sale of alcohol to an intoxicated person, I decided to terminate Pat Rogers for just cause under Rule 6 of the Rules of Employment and Management of the Off Campus Liquor Store.

A letter of termination was dated Wednesday, ____ (**Week -5**), received by Pat Rogers and signed by Pat Rogers on Wednesday, ____ (**Week -5**).

On Tuesday, ____ (**Week -4**), I received a letter from Pat Rogers complaining about the termination and also including statements allegedly made by persons from my office to the Metropolitan News newspaper. After receiving Rogers' letter, I wrote a return letter on Friday, ____ (**Week -4**) in which I denied that anyone from my office made statements to the paper. However, on Friday, ____ (**Week -3**), I learned that the information provided to the newspaper was provided by my administrative assistant, John Marden. It was improper for Marden to make those off-the-record statements to the newspaper. I accepted John Marden's resignation that day and Marden is no longer employed by the University.

Sincerely,

Dr. D. Laterno

Dr. D. Laterno

President

Midstate University

APPENDICES

APPENDIX A

Directions

BURDEN OF PROOF

Arbitration

The Employer has the burden to prove just cause for discipline and just cause for the extent of the discipline/termination. In an arbitration, the Employee may be terminated, suspended or reinstated with or without back pay. Additional damages are not available in an arbitration.

ORDER OF PRESENTATION AND RULES OF EVIDENCE

Arbitration (See Collective Bargaining Agreement Article 28)

- The Employee (grievant) shall be represented by the Union.
- The Employer shall present the first opening statement and the concluding final argument.
- The Employee (grievant) shall not have a rebuttal final argument.
- The arbitrator shall determine the Rules of Evidence that shall apply.

SUGGESTED TIME SCHEDULE

The following schedule indicates how the time may be allocated. The time available for opening statement, witness examination, and final argument may be allocated as the attorneys wish. Objections and arguments will be counted against the attorney that is speaking.

Arbitration - 3 Hours

Each side has 65 minutes available and will be responsible for keeping track of its time. The trial may take less time however, the time should not exceed 3 hours.

Preliminary Discussion 10 minutes

Plaintiff	65 minutes —>	[Opening statement 5 min.]
Employer/Midstate University		[Direct examination 30 min.]
		[Cross-examination 15 min.]
		[Final argument 10 min.]
Defendant	65 minutes —>	[Opening statement 5 min.]
Employee/Rogers		[Direct examination 20 min.]
		[Cross-examination 30 min.]
		[Final argument 10 min.]
Critique	30 minutes	
Breaks	20 minutes	

Negotiation and Mediation

The time schedules for negotiation and mediation exercises will be determined by faculty.

APPENDIX B

Some Just Cause Definitions

SOME JUST CAUSE DEFINITIONS

(Examine your own jurisdictions's case law and statutes for definitions of just cause.)

The Supreme Court of the United States decided in 1960 that an arbitrator “does not sit to dispense his own brand of industrial justice.” One of the court’s most liberal jurists, William O. Douglas, wrote:

[A]n arbitrator is confined to interpretation of the collective bargaining agreement; he does not dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 463 NITA 2d 299 (Year -46).

Prof. Edgar A. Jones Jr., a respected labor arbitrator, carefully questioned Justice Douglas:

[A]ny arbitrator who has looked down the long corridor of his conscience at a “just cause” disciplinary grievance is apt to feel that, at best, it is pious sentiment, and, at worst, that it obscures and encumbers the abrasive necessity of pulling all of the elements of decision, including whatever biases he may experience, down into plain view. The parties in the “just cause” provision have conferred upon management the discretion to discipline the employees, but only for “just cause.” Can it be said that the arbitrator does not sit to dispense his own brand of justice in that case? At that point, what other brand could there possibly be? Perhaps it is thought that it is necessary to the preservation of the acceptability of the arbitral process to enshroud it with a Delphic mystique. Assuming it was desirable (which it is not), does anyone really think it can be done? *11 UCLA L. Rev.* 675, 764 (1964).

Almost 20 years later, Prof. Jones reached a slightly different conclusion, but made the same point that arbitrators are chosen for their brand of industrial justice:

If the arbitrator in these cases “does not sit to dispense his own brand of industrial justice,” what other brand is available for him to dispense? The standard answer is “that of the parties.” If that be so, where does the arbitrator locate the parties’ brand of justice when they have not set it out in the agreement?

It would be astonishing if employers and unions did not pay considerable attention to the personal characteristics of the individual whom they select from the pack of available brands of industrial justice. This scrutiny by the collective bargainers is far from casual, particularly when lawyers are involved. The selection of an arbitrator is seen as central to the tactical problem of getting a favorable decision. *30 UCLA L. Rev.* 881, 886, 889 (1983).

The following discussion covers the various definitions of just cause that have been developed, with particular attention on those arbitrators who are active.

Fundamental Understanding of the Employment Relationship

Roger I. Abrams and Dennis R. Nolan are law professors and arbitrators. In their law review article (1985 *Duke L. J.* 594), they conclude that a true definition of just cause does not exist.

Just cause is hardly an obvious concept. When applying it to specific cases, arbitrators tend to define just cause in nebulous terms or to make conclusory statements. For example, “reasonable” discipline is permissible³ but “arbitrary,” “excessive,” or “discriminatory,” discipline is not.⁴ A penalty that does not “shock the conscience” of the arbitrator is upheld,⁵ but one that is not “just” under “all the circumstances” is set aside.⁶ In fact, one arbitrator characterized the term “just cause” as “purposefully ambiguous.”⁷ Although some arbitrators have identified various procedural prerequisites for just cause, even they have failed to base their proposals on a comprehensive theory of employee discipline.

Leaving the determination of just cause to the discretion of effectively unreviewable arbitrators leads to inexplicable results. . . . Such decisions fail to serve the interests of either management or labor. They provide neither guidance for future conduct nor persuasive rationales. A systematic model of just cause is needed to guide employers and employees in their day-to-day conduct and to assist arbitrators in resolving disciplinary matters.

Hence, they propound a theory of just cause that seems based on an economic model:

- A. Just cause for discipline exists only when an employee has failed to meet his obligations under the fundamental understanding of employment relationship. The employee’s general obligation is to provide satisfactory work. Satisfactory work has four components:
 1. Regular Attendance.
 2. Obedience to reasonable work rules.
 3. A reasonable quality and quantity of work.
 4. Avoidance of conduct, either at or away from work, which would interfere with the employer’s ability to carry on the business effectively.

³ See *3M Co.*, 80 Lab. Arb. (BNA) 926, 928 (1983)(Gallagher, Arb.); *Napoleon Bd. of Educ.*, 74 Lab. Arb. (BNA) 303, 305 (1980)(Roumell, Arb.); *Riley Stoker Corp.*, 7 Lab. Arb. (BNA) 764, 768 (1947)(Platt, Arb.).

⁴ See *United States Sugar Corp.*, 82 Lab. Arb. (BNA) 604, 609 (1984)(Hanes, Arb.); *Kansas City Area Transp. Auth.*, 82 Lab. Arb. (BNA) 409, 413 (1984)(Maniscalco, Arb.); *Atlantic Richfield Co.*, 69 Lab. Arb. (BNA) 484, 487 (1977)(Sisk, Arb.).

⁵ See *Monarch Mach. Tool Co.*, 82 Lab. Arb. (BNA) 880, 883 (1984)(Schedler, Arb.).

⁶ See *City of Kalamazoo*, 82 Lab. Arb. (BNA) 138, 149-41 (1983)(Ellman, Arb.).

⁷ *Municipality of Anchorage*, 82 Lab. Arb. (BNA) 256, 263 (1983)(Hauck, Arb.).

- B. For there to be just cause, the discipline must further one or more of management's three legitimate interests:
 - 1. Rehabilitation of a potentially satisfactory employee.
 - 2. Deterrence of similar conduct, either by the disciplined employee or other employees.
 - 3. Protection of the employer's ability to operate the business successfully.
- C. The concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing "fairness" in disciplinary situations.
 - 1. The employee is entitled to *industrial due process*. This includes:
 - a. actual or constructive notice of expected standards of conduct and penalties for wrongful conduct.
 - b. a decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union assistance if he desires it.
 - c. the imposition of discipline in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: (1) the employee's past record shows that the unsatisfactory conduct will continue; (2) the most stringent form of discipline is needed to protect the system of work rules; or (3) continued employment would inevitably interfere with the successful operation of the business; and
 - d. proof by management that just cause exists.
 - 2. The employee is entitled to *industrial equal protection*, which requires like treatment of like cases.
 - 3. The employee is entitled to *individualized treatment*. Distinctive facts in the employee's record or regarding the reason for discipline must be given appropriate weight. 1985 *Duke L. J.* 694, 611-612.

After explaining how this theory of just cause would apply, they conclude that:

The arbitrator's judgment can be guided by a conceptual model of just cause, a model of the sort proposed here. Every decision maker must determine the facts of a case by, for example, resolving questions of credibility. Our model recognizes that the labor arbitrator must do more than that. He must decide whether the employee failed to provide satisfactory work; whether the discipline furthered one of management's legitimate interests; and whether the employer has provided industrial due process; industrial equal protection, and individualized treatment. The value of a systematic model of just cause, in short, lies not in its ability to supply the right answers, but rather in its power to force the arbitrator to confront the right questions. *Id.*, at p. 623.

Daugherty's Seven Tests

The Seven Tests of Just Cause developed by the late Arbitrator Carroll Daugherty have been widely disseminated. Each of the seven tests are reprinted below. This definition of just cause is losing favor among arbitrators and is rarely, if ever, cited by prominent labor arbitrators. In short, the Seven Tests are headed for extinction.

The test first came under fire by National Academy President John Dunsford, a law professor and arbitrator.⁸ This criticism has been restated by two other distinguished arbitrators. Rolf Valtin, also a former Academy President, believes that the great majority of arbitrators do not follow the 7 tests in the way Daugherty intended.⁹ Arbitrator George Roumell believes each of the 7 tests stands alone, and arbitrators will focus in on one key test, as part of their larger analysis of whether the “discipline was reasonable under the circumstances.”¹⁰

Because Carroll Daugherty was the first to propound a definition of just cause, his Seven Tests are noteworthy. They are historically important.

The Seven Tests of Carroll R. Daugherty *Whirlpool Corp*, 58 LA 421 (1972)

Few if any union-management agreements contain a definition of “just cause.” Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of “common law” definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of seven questions, with accompanying Notes of explanation.

A “no” answer to any one or more of said questions normally signifies that just and proper cause did not exist. In other words, such “no” means that the employer’s disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the Questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more “no” answers so weak and the other “yes” answers so strong that he may properly, without any “political” or spineless intent to “split the difference”

⁸ Dunsford, *Arbitral Discretion: The Tests of Just Cause*, Proceedings of the 42nd Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1990).

⁹ Valtin, *The Just Cause Standard*, 1992 Labor Arbitration Institute (Minneapolis, 1992). Arb. Valtin’s critique is lengthy and worth reading. Here, however, is a brief excerpt: [B]ut the Seven Tests purport to provide an all-encompassing umbrella for automatic application in cases. It will not wash. Indeed, it runs counter to what I think is in the first place to be appreciated about the just cause phrase. The beauty of those two little words is that they permit fair resolution of a literally infinite number of contested situations... Except as to the obvious principles... certainty in just cause cases is an objective which is both misplaced and dangerous. It is misplaced because the field of variables is so vast as to defy definitional efforts except by recourse to endless qualifications. And it is dangerous because there will likely be a loss of fair and realistic results if the variables and their particular contexts are not permitted to play a determinative role.

¹⁰ Roumell, *Just Cause; A Second Look*, Labor Arbitration Institute Detroit Conference, 1993 (Minneapolis: Labor Arbitration Institute, 1993) Arb. Roumell states, “[j]ust cause, i.e., what is reasonable, requires the application of common sense to a given situation. The Seven Tests help pinpoint whether or not common sense has been applied. It may be that in ascertaining whether an employer’s actions were reasonable in a given situation, it is not necessary or even practical to apply each of the Seven Tests. It would seem that rather than necessarily apply all Seven Tests to a given circumstance, the circumstances will determine which of the Seven Tests must be met in order to establish just cause.

between the opposing positions of the parties, find that the correct decision is to “chastise” both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be understood that, under the statement of issue as to whether an employer had just cause for discipline in a case of this sort before an arbitrator, it is the employer and not the disciplined employee who is “on trial” before the arbitrator. The arbitrator’s hearing is an appeals proceeding designed to learn whether the employer in the first instance had forewarned the employee against the sort of conduct for which discipline was considered; whether the forewarning was reasonable; whether the employer, as a sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee’s alleged “crime;” whether from the inquiry said trial court had obtained substantial evidence of the employee’s guilt; whether the employer, in reaching his verdict and in deciding on the degree of discipline to be imposed, had acted in an even-handed, non-discriminatory manner; and whether the degree of discipline imposed by the employer was reasonably related to the seriousness of the proven offense and to the employee’s previous record. In short, an arbitrator “tries” the employer to discover whether the latter’s own “trial” and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand new trial of the employee.

It should be clearly understood also that the criteria set forth below are to be applied to the employer’s conduct in making his disciplinary decision before same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the “common law” requirements of just cause before the discipline was “grieved.”

Sometimes, although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator’s inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that “the only question the arbitrator is to determine shall be whether the employee is or is not guilty of the act or acts resulting in his discharge.” Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below--or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all Seven Questions (and their accompanying Notes) is not only proper but necessary.

The above-mentioned Questions and Notes do not represent an effort to compress all the facts in a discharge case into a “formula.” Labor and human relations circumstances vary widely from case to case, and no formula can be developed where the facts can be fed into a “computer” that spews out the inevitably correct answer on a sheet of paper. There is no substitute for sound human judgment. The Questions and Notes do represent an effort to minimize an arbitrator’s consideration of irrelevant facts and his possible human tendency to let himself be blown by the variable winds of sentiment on to an uncharted and unchartable sea of “equity.”

THE SEVEN QUESTIONS

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed sheets or booklets of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

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?

Note 1: Because considerable thought and judgment have usually been given to the development and promulgation of written company rules, the rules must almost always be held reasonable in terms of the employer's business needs and usually in terms of the employee's performance capacities. But managerial orders often given on the spur of the moment, may be another matter. They may be reasonable in terms of the company's business needs, at least in the short run, but unreasonable in terms of the employee's capacity to obey. Example: A foreman orders an employee to operate a high-speed band saw known to be unsafe and dangerous.

Note 2: If an employee believes that a company rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

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?

Note 1: This Question (and No. 4) constitutes the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly just as an actual third party would.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

Note 5: At his hearing the management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

5. At the investigation did the company "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be fully conclusive or "beyond all reasonable doubt." But the evidence must be truly weighty and substantial and not flimsy or superficial.

Note 2: When the testimony of opposing witnesses at the arbitration appeals hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people instead of that given by the accused employee and his witnesses. Such grounds may include a decision as to which side had the weightier reasons for falsification.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A “no” answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

Note 3: For an arbitral finding of discrimination against a particular grievant to be justified, he and other employees found guilty of the same offense must have been in reasonably comparable circumstances.

Note 4: The comparability standard considers three main items - the degree of seriousness in the offense, the nature of the employee’s employment records, and the kind of offense.

(a) Many industrial offenses, e.g., in-plant drinking and insubordination, are found in varying degree. Thus, taking a single nip of gin from some other employee’s bottle inside the plant is not so serious an offense as bringing in the bottle and repeatedly tipping from it in the locker room. Again, making a small, snide remark to and against a foreman is considerably less offensive than cussing him out with foul language, followed by a fist in the face.

(b) Even if two or more employees have been found guilty of identical degrees of a particular offense, the employer may properly impose different degrees of discipline on them, provided their records have been significantly different. The man having a poor record in terms of previous discipline for a given offense may rightly, i.e., without true discrimination, be given a considerably heavier punishment than the man whose record has been relatively unblemished in respect to the same kind of violation.

(c) The words “same kind of violation,” just above, have importance. It is difficult to find discrimination between two employees found guilty of totally different sorts (not degrees) of offenses. For example, poor work performance or failure to call in absences have little comparability with insubordination or theft.

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?

Note 1: A trivial proven offense as such does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a “good,” and “fair,” or a “bad” record. Reasonable judgment thereon must be used.)

Note 2: An employee’s record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for “discriminating” among them in the administration of discipline for said offense. Thus, if employee A’s record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm “Yes” answers to all the first six questions. Suppose further that the proven offense of the accused employee was a very serious one, such as drunkenness on the job; but the employee’s record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country’s oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though the arbitrator, if he had been the original “trial judge,” might have imposed a lesser penalty. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.

EXHIBITS LIST

[Exhibits Located on CD]

- Exhibit 1: Collective Bargaining Agreement - Article 28**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 2: Metropolitan News [University Sells Soul for Alcohol Money]**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 3: Metropolitan News [Opponents of Liquor Store Gift: Shame on ‘U’!]**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 4: Metropolitan News [Manager Wanted-Want Ad]**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 5: Rogers’ Application Letter**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 6: Rogers’ Resume**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 7: Letter of Hiring from Alex Margolis**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 8: Rules of Employment and Management of the Off Campus Liquor Store**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 9: Six-Month Probationary Period Job Review for Pat Rogers**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 10: Incident Report of Chief of Police, M.J. Troy**
(Witnesses: Police Chief Troy and President D. Laterno)
- Exhibit 11: Photograph of Tolefson’s Receipt of Purchase from Off Campus Liquor Store**
(Witness: Police Chief Troy)
- Exhibit 12: Photograph of Tolefson’s Bottle of GlenLucy in Bag**
(Witness: Police Chief Troy)
- Exhibit 13: Photograph of Tolefson’s Bottle of GlenLucy in Bag**
(Witness: Police Chief Troy)
- Exhibit 14: Photograph of Tolefson’s Bottle of GlenLucy**
(Witness: Police Chief Troy)
- Exhibit 15: Letter from Pat Rogers to President D. Laterno**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 16: Termination Letter from President D. Laterno to Pat Rogers**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 17: Metropolitan News [Liquor Store Manager Fired for Selling Booze]**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 18: SPEU Grievance Form**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 19: Letter from Pat Rogers to President D. Laterno**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 20: Letter from President D. Laterno to Pat Rogers**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 21: Follow-Up Report by Chief M.J. Troy**
(Witnesses: Police Chief Troy and President D. Laterno)
- Exhibit 22: Follow-Up Incident Diagram Prepared by Police Chief, M.J. Troy**
(Witnesses: Pat Rogers, Police Chief Troy and President D. Laterno)
- Exhibit 23: Letter from Pat Rogers to Union Advocate**
(Witnesses: Pat Rogers and President D. Laterno)
- Exhibit 24: Letter from President D. Laterno to Attorneys Representing Midstate University**
(Witnesses: Pat Rogers and President D. Laterno)

Supplemental Learning and Teaching Materials List

[Materials Located on CD]

Planning Guide and Checklist

- Section 1. General
- Section 2. Negotiation
- Section 3. Mediation
- Section 4. Discovery
- Section 5. Motions/Oral Argument
- Section 6. Trial (Court/Jury) - Arbitration

Learning Objectives

- Depositions
- Trial (Court/Jury) - Arbitration
- Negotiation
- Mediation
- Motions/Oral Argument
- Expert Witnesses

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