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Civil Servant Employee Disciplinary Proceedings: A Comparative Analysis and Recommendations for a Uniform Statute

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CIVIL SERVANT EMPLOYEE DISCIPLINARY PROCEEDINGS: A COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR A UNIFORM STATUTE

by

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I. INTRODUCTION

The purpose of this article is to analyze the disciplinary proceedings for non-probationary civil servants on the state and federal level.[1] The article will focus on the procedures adopted by the states of California, Illinois, and New York,[2] and the Federal statutes and regulations.[3] Furthermore, recommendations will be offered to establish a model statute regulating the procedural aspects of employee disciplinary proceedings.

II. THE NEW PROPERTY AND THE DUE PROCESS REVOLUTION

A. *Introduction to the Concept of Property*

The concept of property is amorphous,[4] and thus, the concept of property rights has undergone a transformation and expansion for centuries.[5] Professor

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[1]It is essential to differentiate between probationary and non-probationary employees. Probationary employees have limited rights, and in reality serve at the discretion of their employer. Non-probationary employees are granted certain rights pursuant to statutory law which govern their employment. For example, federal law defines a non-probationary employee as follows:

> [E]mployee means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less.

5 C.F.R. § 752.101(1) (1985).

[2]This article will analyze the procedures of the Cailfornia State Personnel Board. In Illinois the discussion will concentrate on municipal civil service proceedings and the Chicago Police Board. The primary focus in New York will be the procedures entailed in the New York State Civil Service Law. Furthermore, this article will also explore the statutes regulating disciplinary proceedings in Massachusetts, Minnesota, Ohio, and Wisconsin.

[3]Disciplinary proceedings against federal employees will be examined from Adverse Actions to the Merit Systems Protection Board.

[4]Property has been defined as the following: "That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government . . . The term is said to extend to every species of valuable right and interest." (citations ommitted.) BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). Property interests exist in various tangible and intangible objects. *See* Pittsburgh Athletic Co. v. KQV Broadcasting, 24 F. Supp. 490 (W.D. Pa. 1938) (Property interest in the radio transmission of a baseball game). Other types of property include patents, trademarks, and copyrights.

The recent developments in the operation of government has led to the creation of a new type of property interest called the statutory entitlement which has been defined as the following:

"From these cases, however, one can infer a tentative definition of statutory entitlement: a statute will create an entitlement to a government benefit either if the statute sets out conditions under which the benefit *must* be granted or if the statute sets out only conditions which the benefit may be denied." *See also* Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 DUKE L.J. 89.

[5]"Property in the lawyer's sense has undergone even vaster changes through the centuries. Each recognition

Charles Reich in his seminal article *The New Property*,[6] analyzed the evolution of the new property and the consequences of establishing a welfare state.[7] Individuals rely on government to provide numerous services.[8] Likewise, various industries rely on government for contracts,[9] subsidies,[10] and regulation.[11] Many segments of society have become dependent on some form of government service or program.[12] These segments of society require protection from the arbitrary and capricious withdrawal of these services and programs. The extent to which procedural due process must be offered these segments of society is affected by the extent to which they may be "'condemned to suffer grievous loss' and depends upon whether their interest in avoiding that loss outweighs the governmental interest in summary adjudication."[13]

B. *The Supreme Court and the Due Process Revolution*

1. *Goldberg v. Kelly*

In the landmark case of *Goldberg v. Kelly*,[14] the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required that a public-assistance recipient receive an evidentiary hearing prior to the termination of

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of a new thing as the object of legal rights has opened a new chapter in the law, often one of vast complexity. But even as regards things recognized for centuries as property, the rights in them recognized by law have been forever changing." Philbirck, *Changing Conceptions of Property in Law*, 87 U. PA. L. REV. 691, 692 (1938).

[6]73 YALE L.J. 733 (1964).

[7]Professor Reich documented how society had become dependent on government. Government intervention took various forms: licensing professions, subsidizing industries, granting franchises, and rendering various services. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[8]The indigent receive numerous social services from the government including: legal aid; education; housing; and health care. Middle income people utilize suburban mass transportation systems to commute to their place of employment. All segments of society receive police and fire protection, sanitation, and water and sewer services. *See generally* D. Netzer, ECONOMICS AND URBAN PROBLEMS (2d ed. 1974).

[9]The aerospace industry does a considerable amount of business with the Department of Defense, and this relationship has produced numerous breakthroughs in aerospace technology. T. COCHRAN, BUSINESS IN AMERICAN LIFE: A HISTORY 323 (1972).

[10]Subsidies may occur through special tax treatment to a particular industry, for example, rapid depletion allowance. Another form of subsidy by direct government grant is, for example, agriculture price supports.

[11]Regulation is another form of government intervention in the economy. Regulatory activity is important because it can determine who will be able to compete in certain industries. Regulation can be tailored to be so stringent that only a few competitors will be able to satisfy the regulatory criteria. Licensing is a consequential type of regulatory action because permission must be obtained prior to commencing the transaction of business. *See* E. REDFORD & C. HAGAN, AMERICAN GOVERNMENT AND THE ECONOMY 361 (1965).

[12]"Public sector jobs, public sector licenses, public sector housing, public sector education, etc., pervade the county. The personal security of these connections with government has come to occupy in the lives of many individuals much the same position that the security of the old property (land and chattels) previously held. Under the new feudalism, however, the connections with government are frankly no more secure than was the old property under the old feudalism — when no one owned property but each held it under some contingent or conditional tendency, perpetually insecure of manorial largess." Van Alstyne, *Cracks in "The New Property" Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453-54 (1977). *See also* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 153 (1958).

[13]Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

[14]*Id.* at 254.

his welfare benefits.[15] Writing for the majority, Justice Brennan employed a balancing test between the interests of the recipient and the interests of the government.[16] The Court concluded that the deprivation of welfare benefits to a recipient would be greater than the cost of providing a pre-termination hearing because termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of his sustenance.[17]

The Court distinguished the termination of welfare benefits from other terminations where a right to a pre-termination hearing may not be as critical, such as a blacklisted government contractor.[18] Significantly, the Court discussed the ramifications of the new property by stating that "[i]t may be realistic today to regard welfare entitlements more like 'property' than 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."[19] By its holding, the Court expanded the type of property interest shielded by the Constitution.[20] Further, the Supreme Court has employed *Goldberg* on various occasions to expand the interests applicable to protection under the Due Process Clause.[21]

2. *Board of Regents v. Roth*

The Supreme Court addressed the concept of entitlement in the context of public employment in *Board of Regents v. Roth.*[22] In *Roth,* the respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for a term of one academic year. The respondent com-

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[15] *Id.* at 261.

[16] *Id.* at 264-66.

[17] "For a qualified recipient, welfare provides the means to obtain essential food, clothing, housing and medical care. Thus the crucial factor in this context . . . is that the termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264. *See also* Note, *The Equal Protection-Substantive Due Process Resurrected Under a New Name?* 3 FORDHAM URB. L.J. 311, 318 (1975).

[18] *Id.* at 264.

[19] *Id.* at 262, n.8.

[20] *The Supreme Court, 1969 Term,* 84 HARV. L. REV. 1, 101-104 (1970).

[21] *See, e.g.,* Bell v. Burson, 402 U.S. 535 (1971) (due process protection applicable to the suspension of a driver's license); Fuentes v. Shevin, 407 U.S. 67 (1972) (due process applicable to prejudgment replevin of goods); Morrissey v. Brewer, 408 U.S. 471 (1974) (due process applicable to parole revocation); Perry v. Sindermann, 408 U.S 593 (1972) (due process applicable to the dismissal of a college professor); Goss v. Lopez, 419 U.S. 565 (1975) (due process applicable to the discipline of public school students).

An illustrative case is Bell v. Burson, 402 U.S. 535 (1971). In *Bell,* Georgia law provided that the driver's license and registration of an uninsured motorist involved in an accident would be suspended unless he posted security to cover the amount of damages claimed by the injured party.

The Court held that an administrative hearing must be conducted before a motorist's license and registration may be suspended to determine whether there is a reasonable likelihood of a judgment in the amount claimed against the motorist. The Court observed that a driver's license is important because without it some individuals are unable to earn a living.

For a discussion of this area, see Rendleman, *The New Due Process: Rights and Remedies,* 63 KY. L.J. 531 (1975).

[22] 408 U.S. 564 (1972).

pleted the academic year; however, he was informed that he would not be retained for the next academic year. The applicable law delegated the decision of whether to rehire a nontenured professor to the discretion of the university officials. Under Wisconsin law, a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior."[23] The respondent contended that he was entitled to a hearing concerning his nonretention and that a lack of a hearing violated his due process rights.[24]

The Supreme Court held that the respondent did not have a constitutional right to a statement of reasons concerning his nonretention and that he did not have a constitutional right to a hearing.[25] The Due Process Clause is only applicable to deprivations of property and liberty, and the spectrum of interests protected is limited.[26] Speaking for the majority, Justice Stewart discussed the institution of property, and held that for a property interest to be protected by the Constitution the property interest must be derived from either federal or state law.[27] The employment contract provided that the respondent would be employed for a year; the appointment did not provide for automatic renewal absent "sufficient cause."[28] Consequently, the respondent was not entitled to a hearing or statement of reasons concerning his nonretention.[29]

3. *Perry v. Sindermann*

In *Perry v. Sindermann,*[30] the respondent was employed for a ten-year period as a professor of government by the state college system of the State of Texas. In May, 1969, the respondent's one-year contract was discontinued, and the respondent was not offered a contract for the next academic year. The Board of Regents did not issue a statement of reasons for dismissing the respondent, and the respondent was not granted a hearing to contest the termination. The respondent alleged that the college's faculty guide contained a

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[23] WIS. STAT. § 37.31(1) (1967).

[24] 408 U.S. 569 (1972).

[25] *Id.*

[26] Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
Id. at 577.

[27] "Property interests, or course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Id.* at 577.

[28] *Id.* at 578.

[29] *Id.* at 579.

[30] 408 U.S. 593 (1972).

statement that there was a tenure system, that each faculty member is granted tenure as long as his teaching services were acceptable and he cooperated with his superiors and peers.

The Court held that the respondent's allegations, if proven, constituted sufficient basis to grant the respondent a hearing.[31] If it were true that the college had established an unwritten policy which was tantamount to tenure, that policy would be sufficient to create an entitlement to employment.[32] Therefore, the entitlement would constitute a property right, and a hearing would be necessary to prevent the loss of such right and to satisfy the due process procedural requirements.[33]

4. *Arnett v. Kennedy*

The next case involving due process and employment termination was *Arnett v. Kennedy*.[34] Wayne Kennedy was a non-probationary federal employee in the competitive civil service, and he was a field representative in the Chicago Regional Office of the Office of Economic Opportunity (OEO). The appellee's employment was terminated, pursuant to the Lloyd-LaFollette Act, which provides the procedures for the dismissal of non-probationary employees. Under the Lloyd-LaFollette Act, trial type procedures are conducted subsequent to termination. Kennedy was dismissed for accusing his superior of attempting to bribe an official of a local community organization with which the OEO dealt. The appellee was sent a notification of Proposed Adverse Action. Kennedy refused to respond to the charges, and instead, he asserted that the charges were unlawful because he contended that he had a right to an impartial hearing prior to termination. The appellee instituted suit; the district court held that the Lloyd-LaFollette Act and the germane regulations were unconstitutional on the ground that Kennedy was denied due process of law because the procedures of the OEO failed to provide for an impartial trial-type hearing prior to dismissal.

The Supreme Court, with Justice Rehnquist writing for a plurality,[35] held that the termination procedures were in compliance with the Due Process Clause. Justice Rehnquist reasoned that the property interest in continued employment was conditioned by the procedural constraints contained in the granting of the position.[36] The Court stated that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining a right, a litigant in the position of ap-

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[31] *Id.* at 599-600.

[32] *Id.* at 601.

[33] *Id.* at 601-602.

[34] 416 U.S. 134 (1974).

[35] The plurality consisted of C.J. Burger, J. Stewart, and J. Rehnquist.

[36] *Id.* at 153-154.

pellee must take the bitter with the sweet."[37]

In a concurring opinion written by Justice Powell, and joined in by Justice Blackmun, the Court held that the dismissal procedures were constitutional. Justice Powell conducted a balancing test, and he concluded that the government's interest in maintaining an efficient civil service mandated that a hearing be conducted after termination.[38] Prolonged retention of an unsatisfactory employee could adversely affect discipline and morale at the agency, foster disharmony, and impair the efficiency of the agency.[39] Moreover, Justice Powell stated, unlike the welfare recipient in *Goldberg,* a public employee may have independent resources to overcome the temporary adversity.[40] In addition, the employee may secure temporary employment in the private sector or he may apply for public assistance.[41]

The *Kennedy* decision was a deviation from applicable precedent because the government employee was a non-probationary employee.[42] Therefore, under the rationale of cases like *Roth* and *Sindermann,* Kennedy had a recognized property interest in continued employment as a federal civil servant, and he would have been entitled to certain minimal constitutional protections which could not be abrogated by a mere statute.[43]

5. *Bishop v. Wood*

The final employment dismissal due process case is *Bishop v. Wood.*[44] The petitioner was fired as a policeman without a hearing to determine whether grounds existed to terminate his employment. The petitioner was a permanent employee, and the applicable statute stated that the petitioner could be dismissed if he were negligent, inefficient, or unfit for his duties.[45] Under the ap-

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[37] *Id.* at 153-154.

[38] *Id.* at 167-168.

[39] "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiently of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delays, and deter warranted discharges." *Id.* at 168.

[40] *Id.* at 169.

[41] *Id.* at 169.

[42] The plurality would thus conclude that the statute governing federal employment determines not only the nature of the appellee's property interest, but also the extent of the procedural protections in which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann.* Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee.

Arnett, 416 U.S. at 166-167 (1974) (Powell, J., concurring). *See* Simon, *Liberty and Property in the Supreme Court: A Defense of Rother and Perry,* 71 CALIF. L. REV. 146, 175 (1983).

[43] *Arnett,* 416 U.S. at 166 (Powell, J., concurring). *See also* Van Alstyne, *Cracks in "The New Property" Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445, 465 (1977).

[44] 426 U.S. 341 (1976).

[45] Art. II, § 6, Personnel Ordinance of City of Marion.

plicable statute, the petitioner was entitled to only a written notice of the reasons for his discharge.[46]

The Court held that the termination procedures were consistent with the Due Process Clause.[47] Writing for the majority, Justice Stevens construed the local ordinance as granting only the mandated basic procedural requirements for employee termination.[48] The Court placed great reliance on the district court's interpretation of state law,[49] holding that the petitioner "held his position at the will and pleasure of the city."[50] Consequently, the petitioner was granted limited procedural rights which were not subject to judicial review.[51]

In the early 1970's, the Supreme Court rulings established minimum due process requirements for the dismissal of non-probationary civil servants.[52] Nevertheless, the Court, with its decisions in *Arnett* and *Bishop,* withdrew this protection from non-probationary civil servants whose employment was terminated, and made government employees dependent upon the safeguards embodied in the relevant statutes.[53] Consequently, the focus of the inquiry must be transferred to the statutes regulating the disciplinary procedures for non-probationary civil servants.[54]

III. STATUTES REGULATING DISCIPLINARY PROCEDURES FOR NON-PROBATIONARY CIVIL SERVANTS

A. *Introduction*

Several states and the federal government have adopted procedures for disciplining and terminating non-probationary civil servants.[55] Generally, these statutes provide for notice of the charges,[56] the right to counsel,[57] the right to a

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[46] *Id.*

[47] *Bishop,* 426 U.S. at 347.

[48] *Id.* at 345-346.

[49] The Court deferred to the district court's interpretation of local law because the law in this area was muddled. Further, the district court judge had been a local practitioner, and thus, he was cognizant of local law. *Id.* at 345-346.

[50] *Id.* at 345-346.

[51] *Id.* at 347.

[52] Comment, *Government Employee Disclosure of Agency Wrongdoing: Protecting the Right to Blow the Whistle,* 42 U. CHI. L. REV. 530, 553-554 (1975).

[53] Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement,* 44 U. CHI. L. REV. 60, 72-73 (1976).

[54] Van Alstyne, *Cracks in "The New Property" Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445, 469 (1977).

[55] *E.g.,* CAL. GOVT. CODE § 19570 *et. seq.* (Deering 1982); ILL. ANN. STAT. §§ 10-1-18 and 18.1 (Smith-Hurd Supp. 1985); MASS. ANN. LAWS ch. 31, § 41 (Michie/Law. Coop. 1983); MICH. COMP. LAWS ANN. § 38.416 (West 1985); MINN. STAT. ANN. § 43A.33 (West Supp. 1985); N.Y. CIV. SERV. LAW § 75 (McKinney 1983); OHIO REV. CODE ANN. § 124.34 (Page 1984); WIS. STAT. ANN. § 230.34 (West Supp. 1985); 5 U.S.C. § 7501 *et seq.* (1983); 5 C.F.R. § 738.313 (1985).

[56] MINN. STAT. ANN. § 43A.33(3)(a) (West Supp. 1985); N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983); WIS. STAT. ANN. § 230.34(1)(b) (West Supp. 1985).

[57] *E.g.,* MASS. ANN. LAWS ch. 31, § 41 (Michie/Law. Coop. 1983).

hearing,[58] and the right to a written decision.[59] This paper will concentrate on examining the following state statutes: California,[60] Illinois municipal civil service[61] and Chicago Police Board,[62] and New York.[63] Furthermore, the employee disciplinary process at the federal level will be explored including Adverse Actions[64] and the Merit System Protection Board (MSPB).[65]

B. *The State Statutes*

1. California

California has a comprehensive statute which governs proceedings against non-probationary employees.[66] The statute defines the causes for discipline,[67] grants notice of the charges,[68] permits discovery,[69] grants the right to counsel,[70] authorizes the issuance of subpoenas,[71] grants the right to a hearing,[72] and in contested proceedings a decision will be issued.[73] Also, the California statute provides that employee disciplinary proceedings are to be conducted by the State Personnel Board.[74]

2. Illinois

The Illinois statute pertaining to municipal civil service disciplinary proceedings provides that a discharged employee must have notice of the charges,

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[58] *E.g.*, N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983).

[59] *E.g.*, CAL. GOVT. CODE § 19582 (Deering 1982).

[60] CAL. GOVT. CODE § 19570 *et. seq.* (Deering 1982).

[61] ILL. ANN. STAT. § 10-1-18 (Smith-Hurd Supp. 1985).

[62] ILL. ANN. STAT. § 10-1-18.1 (Smith-Hurd Supp. 1985).

[63] N.Y. CIV. SERV. LAW § 75 (2) (McKinney 1983).

[64] 5 U.S.C. § 7501 *et. seq.* (1983).

[65] CAL. GOVT. CODE § 19574 *et. seq.* (Deering 1982).

[66] One of the strengths of the California statute is that it extensively defines the causes for discipline. Some of the causes for discipline are: incompetency; inefficiency; neglect of duty; insubordination; drunkenness; intemperance; and unlawful discrimination. CAL. GOVT. CODE § 19574 (Deering Supp. 1986).

[67] An employee must be served with a statement informing him of the nature of the proceeding, the grounds for the action, and that he has the right to answer the charges. CAL. GOVT. CODE § 19574 (Deering Supp. 1986).

[68] The notice must in ordinary language inform the employee of the reasons why the adverse action is being commenced, that he has the right to reply to the charges, and that the deadline by which the appeal must be filed. *Id.* at § 19574.

[69] The statute grants the right to inspect documents pertinent to the proceeding and which would be admissible at the hearing. *Id.* at § 19574.1. Moreover, an employee is entitled to interview other employees who have information relevant to the proceeding. *Id.* at § 19574.1.

[70] *Id.* at § 19574.1.

[71] *Id.* at § 19581.

[72] *Id.* at §§ 19578 & 19582.

[73] *Id.* at § 19582. A written decision requirement is vital because if an adverse determination is rendered the written decision will be the basis of the appeal.

[74] *Id.* at § 19578.

the right to counsel, the right to a record, the right to a hearing, and the right to receive a decision.[75] Significantly, the statute is silent concerning discovery, and it fails to enunciate the grounds for which an employee may be disciplined.[76] In cities with a population greater than 500,000 residents in Illinois, special procedures are applicable to disciplinary proceedings involving police officers.[77] A Police Board is empowered to conduct disciplinary hearings and adopt its own rules of procedures.[78] The accused officer has the right to notice of the charges against him, the right to counsel, the right to cross-examine witnesses, the right to present witnesses on his own behalf, and the right to a hearing.[79]

3. New York

New York Civil Service Law Section 75(2) defines the procedural rights of a tenured civil servant in disciplinary proceedings.[80] An employee must receive notice of the charges, has the right to counsel, the right to summon witnesses, and the right to a hearing.[81] The burden of proof is on the party alleging the misconduct or incompetency, and the technical rules of evidence are waived.[82]

C. *The Federal Statutes*

1. Adverse Actions

Adverse Actions is the term employed for disciplinary proceedings involving non-probationary federal employees.[83] In an Adverse Action in which the penalty to be imposed is a suspension[84] of fourteen days or less, a non-probationary employee is afforded limited procedural rights.[85] The employee is entitled to receive advance written notice of the charges including the reasons for the proposed action.[86] Further, the employee must be granted a reasonable amount of time to reply either in writing or orally, and sufficient time to sub-

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[75] ILL. ANN. STAT. ch. 24, § 10-1-18 (Smith-Hurd Supp. 1985).

[76] Employees may be disciplined for "just cause." *Id.*

[77] ILL. ANN. STAT. ch. 24, § 10-1-18.1 (Smith-Hurd Supp. 1985).

[78] *Id.*

[79] *Id.*

[80] N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983).

[81] *Id.*

[82] *Id.*

[83] "'[E]mployee' means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less." 5 U.S.C. § 7501(1) (1983).

[84] "'[S]uspension' means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. § 7501(2) (1983).

[85] In an adverse action involving a suspension of fourteen days or less, an employee is not entitled to a hearing. 5 U.S.C. § 7503(b) (1983).

[86] 5 U.S.C. § 7503(b)(1) (1983).

mit affidavits and other documents.[87] Moreover, the employee also has the right to counsel and the right to receive a written decision.[88]

Different procedural rules apply when the penalty sought in an Adverse Action includes removal, suspension for more than fourteen days, reduction in pay, reduction in grade, or furlough.[89] An employee must receive at least thirty days advance written notice of the charges unless there are sufficient grounds to believe that the employee has committed a crime.[90] In addition, the employee must be granted at least seven days to submit responding documents.[91] The pertinent statute also grants the right to counsel and the right to a written decision.[92] Importantly, it is at the agency's discretion to grant the employee a hearing.[93]

2. The Merit Systems Protection Board

The Merit Systems Protection Board (MSPB) is a body that has appellate jurisdiction over Adverse Actions,[94] and the MSPB has an elaborate panoply of procedures that governs its hearings.[95] First of all, the MSPB has its own rules of evidence that govern its proceedings.[96] Additionally, an employee is entitled to employ all the discovery devices under the Federal Rules of Civil Procedure including depositions, interrogatories, production of documents and things, and requests for admissions.[97] If a party fails to comply with an order, the administrative law judge is authorized to sanction the noncomplying party.[98] A litigant is entitled to have his case heard before an impartial official,[99] and a litigant may make a motion to disqualify a biased administrative law judge.[100]

All MSPB hearings are public,[101] and transcripts are kept of all of the pro-

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[87] 5 U.S.C. § 7503(b)(2) (1983).

[88] 5 U.S.C. §§ 7503(b)(3) & (4) (1983).

[89] 5 U.S.C. § 7512(1) (2), (4), (3) & (5) (1983).

[90] 5 U.S.C. § 7513(b) (1) (1983).

[91] 5 U.S.C. § 7513(b)(2) (1983).

[92] 5 U.S.C. §§ 7513(b) (3) & (4) (1983).

[93] 5 U.S.C. § 7513(c) (1983).

[94] 5 U.S.C. § 7503(c) & 7513(d) (1983).

[95] 5 C.F.R. § 1201.11 *et. seq.* (1985).

[96] 5 C.F.R. § 1201.61-67 (1985).

[97] 5 C.F.R. § 1201.72 (c) (1985).

[98] 5 C.F.R. § 1201.43(a) (1985).

[99] 5 C.F.R. § 1201.41(b) (1985).

[100] "Any party may file a motion requesting the presiding official to withdraw on the basis of personal bias or other disqualification and specifically setting forth the reasons for the request. The motion shall be filed as soon as the party has the reason to believe there is a basis for disqualification." 5 C.F.R. § 1201.42(b) (1985).

[101] "Hearings shall be open to the public. However, the presiding official may order a hearing or any part thereof closed, where to do so would be in the best interests of the appellant, a witness, the public or other affected persons." 5 C.F.R. § 1201.52 (1985).

ceedings.[102] If necessary, a litigant may obtain a subpoena.[103] Moreover, an employee has the right to be assisted by counsel.[104] If it is found that a case was filed in bad faith, an employee may attempt to secure reimbursement of legal fees.[105] An employee is entitled to a written decision with findings of facts and conclusions, an order containing the final disposition of the case, and a statement concerning the date when the decision will become final.[106]

The next portion of this paper will discuss the major procedural aspects of disciplinary proceedings and recommendations will be offered concerning the implementation of new procedures.

IV. NOTICE AND SERVICE OF THE CHARGES

Notice of the charges, and thus, the opportunity to defend against the charges is fundamental.[107] The notice should be written to apprise the employee of the charges against him; accordingly, the notice should be written in ordinary language.[108] Further, notice should be served by either personal service or certified mail with proof of service to insure that service was effectuated.[109] If the notice of the charges is vague, an employee should be entitled to a bill of particulars.[110]

An employee must have sufficient time to deliberate and interpose an answer.[111] Various disciplinary proceedings are complex actions which may in-

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[102]"A verbatim record made under the supervision of the presiding official shall be kept of every hearing and shall be the sole official record of the proceeding." 5 C.F.R. § 1201.53(a) (1985).

[103]5 C.F.R. § 1201.81 (1985).

[104]5 C.F.R. § 1201.31 (a) (1985).

[105]"[T]he presiding official may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interests of justice." 5 C.F.R. § 1201.37(a) (1985).

[106]5 C.F.R. §§ 1201.111(b)(1), (2) & (3) (1985).

[107]In the landmark case of Mulland v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court stated that notice of a pending action must be devised so as to inform the interested parties. The statutes regulating disciplinary proceedings provide that an employee must be furnished with a copy of the disciplinary charges. OHIO REV. CODE ANN. § 124.34 (Page 1984); 5 C.F.R. § 7503(b)(1) (1980). Most statutes do not provide guidelines for the type of notice which must be furnished to the employee. The California statute is a good statute because it establishes minimum standards for giving notice. In California the notice must:

1) state the nature of the proceeding;
2) state the date of the action;
3) contain a statement of the cause of action;
4) be written in ordinary language;
5) advise the employee of his rights.

CAL. GOVT. CODE § 19574 (Deering 1984).

[108]CAL. GOVT. CODE § 19574 (Deering 1984).

[109]This provision is intended to insure that the employee is actually notified that there is an impending disciplinary hearing.

[110]Although the New York Civil Service Law does not provide for a Bill of Particulars, under case law an accused employee may secure a Bill of Particulars. Fitzgerald v. Libous, 44 A.D.2d 660, 405 N.Y.S.2d 32, 376 N.E.2d 193 (1978); Owen v. Town Bd. 94 A.D.2d 768, 462 N.Y.S.2d 715 (1983); Pachucki v. Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917 (1977).

[111]Section 75(2) of the New York Civil Service Law requires that an accused employee be granted a

volve several incidents, and therefore, time is necessary to draft a responsive pleading. Consequently, an employee should be allowed a minimum of ten calendar days to submit an answer.[112]

V. DISCOVERY

A. *Discovery in Civil Litigation*

The Federal Rules of Civil Procedure (FRCP) authorize various devices to secure information relevant to the controversy from other parties, which includes depositions, interrogatories, production of documents and things, entry upon land for inspection, and requests for admissions.[113] Litigants are entitled to obtain discovery of any matter not privileged and which is relevant to a claim or defense.[114] Thus, to facilitate the resolution of disputes the discovery rules are to be construed liberally.[115] By utilizing discovery the parties are able to intelligently evaluate the issues, and to determine whether it is prudent to negotiate a settlement.[116]

Most states have liberalized their discovery procedures to mirror the FRCP thereby providing for broad discovery.[117] On the state level, discovery

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minimum of eight days to interpose an answer. N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983) Minnesota grants an employee five working days in which to submit an answer. MINN. STAT. § 43A.33 (1984). Five working days is insufficient to prepare a responsive pleading because research and client interviews may take more than five days.

A federal civil servant who faces the possibility of being terminated is allowed a minimum of seven days to submit a written answer. 5 U.S.C. § 7513(b)(2) (1983). Additionally, a federal civil servant who faces a penalty of suspension of fourteen days or less is permitted a reasonable time to respond to the charges. 5 U.S.C. § 7503(b)(2) (1983).

[112]California grants a civil servant twenty calendar days to submit an answer. CAL. GOVT. CODE § 19575 (Deering 1982). Section 19575 reads in part: "No later than 20 calendar days after service of adverse action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted." CAL. GOVT. CODE § 19575 (Deering 1982). Indeed, it is difficult to comprehend why a litigant in a civil proceeding should be granted a longer period in which to interpose an answer than a civil servant who is in jeopardy of being terminated.

[113]*See* FED. R. CIV. P. 26(a), 30, 31, 33, 34. Also, the Federal Rules of Civil Procedure authorize the physical and mental examination of parties whenever the physical or mental condition of a party is in disupte. FED. R. CIV. P. 35.

[114]FED. R. CIV. P. 26(b). The key concept is relevancy, and thus, the Supreme Court has observed: "'[R]elevant to the subject matter involved in the pending action' — has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). *See also* Local 13, Detroit Newspaper v. NLRB, 598 F.2d 267 (D.C. Cir. 1979); 4 J. MOORE, *Moore's Federal Practice* ¶ 26.56 (1984).

[115]"The discovery provisions of the Federal Rules of Civil Procedure allow the parties to develop fully and crystallize concise factual issues for trial. Properly used, they prevent prejudicial surprises and conserve precious judicial energies. The Supreme Court has said that they are to be broadly and liberally construed. Burns v. Thiokol Chemical Corp., 483 F.2d 300, 304 (5th cir. 1973).

[116]"The more information that is made available to counsel the better the opportunity for counsel to assess the merits each party's position. This is especially important where special damage provisions exist. For example, in antitrust actions treble damages and legal fees are recoverable. 15 U.S.C. § 15(a) (1983).

[117]*E.g.*, ILL. STAT. ANN. ch. 110A, Rule 201 (Smith-Hurd 1985); N.Y. C.P.L.R. § 3101(a) (McKinney Supp. 1986).

devices include depositions, interrogatories, admissions of fact, production and inspection of documents, and physical and mental examination.[118] If a litigant fails to adhere to the discovery rules then various sanctions are available to compel the recalcitrant litigant to comply with the discovery request.[119] The state courts have also steadfastly maintained that discovery statutes are to be interpreted liberally to facilitate the resolution of disputes,[120] and to foster the ascertainment of truth.[121]

B. *Discovery in Criminal Proceedings*

In a criminal proceeding there are compelling reasons for granting a defendant extensive discovery.[122] A defendant may be unable to recall the material facts of the events in question, and he may lack all the documents and objects which are consequential in resolving his guilt or innocence.[123] Discovery facilitates intelligent plea bargaining because a defendant will be cognizant of the pertinent information that will be utilized against him at trial.[124] Importantly, it must be borne in mind, that a defendant is entitled to a fair trial, and the discovery process enables him to prepare for trial.[125]

The Federal Rules of Criminal Procedure afford a defendant liberal discovery rights.[126] Rule 16 of the Federal Rules of Criminal Procedure authorizes a defendant to inspect and copy a substantial amount of information.[127] The

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[118] *See, e.g.*, CAL. CIV. PRO. §§ 2019, 2030, 2033, 2031, & 2032 (Deering Supp. 1986); ILL. ANN. STAT. ch. 110, § 2-1003 & ch. 110.A, Rules 213, 216, 214 & 215 (Smith-Hurd 1983); N.Y. C.P.L.R. RULES 3107, 3120 & §§ 3130, 3121 & 3123 (McKinney Supp. 1986).

[119] *E.g.*, CAL. CIV. PRO. § 2034 (Deering Supp. 1985); N.Y. C.P.L.R. § 3126 (McKinney Supp. 1986).

[120] Williamson v. Superior Court, 21 Cal. 3d 829, 148 Cal. Rptr. 39, 582 P.2d 126 (1978); Shepard v. Superior Court, 17 Cal. 3d 107, 130 Cal. Rptr. 257, 550 P.2d 161 (1976); Carlson v. Superior Court, 56 Cal. 2d 431, 15 Cal. Rptr. 132, 364 P.2d 308 (1961); Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966); Carlson v. General Motors Corp., 9 Ill. App. 3d 606, 289 N.E.2d 439 (1972); Petty v. Riverbay Corp., 92 A.D.2d 525, 459 N.Y.S.2d 441 (1983); Goldberg v. Blue Cross, 81 A.D.2d 995, 440 N.Y.S.2d 349 (1981).

[121] Riehler v. White Metal & Rolling & Stamping Corp., 30 Ill. App. 3d 435, 333 N.E.2d 716 (1975); Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 288 N.Y.S.2d 449, 235 N.E.2d 430 (1968).

[122] In a criminal proceeding the State is able to employ its vast resources to secure a conviction, and hence, Professor Abraham Goldstein has observed:

"[T]he threat of imprisonment makes the criminal sanction an especially grave and terrifying one; an inherited tradition, reflected in constitutional law, makes more specific requirements for criminal cases than it does for civil; there is a general feeling that most cases find the state and defendant mismatched — with the state having far the better of it in prestige and resources." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1150 (1960).

[123] Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82 (1963).

[124] *See generally* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 252 (2d ed. 1982).

[125] Pitchess v. Superior Court, 11 Cal. 3d 531, 535, 11 Cal. Rptr. 897, 900, 522 P.2d 305, 308 (1974); People v. Boucher, 62 Ill. App. 3d 436, 439, 379 N.E.2d 339, 342 (1978).

[126] Rule 16(a) of the Federal Rules of Criminal Procedure entitles a defendant to secure or inspect a copy of any statement made by him; to obtain a copy of his criminal record; to inspect documents and tangible objects; and to inspect and copy results of physical examinations or scientific tests or experiments. FED. R. CRIM. P. 16(a).

[127] *See* 8 J. MOORE, MOORE'S FEDERAL PRACTICE § 16.01 *et. seq.* (1985).

due process clause mandates the right to Rule 16 information.[128] California,[129] Illinois,[130] and New York[131] have enacted statutes regulating the disclosure of information in criminal proceedings, and the courts in these jurisdictions have rigorously enforced a defendant's right to secure such information.[132]

C. *Discovery in Disciplinary Proceedings*

Most jurisdictions limit discovery in disciplinary proceedings.[133] California provides for liberal discovery, and allows an employee to inspect documents and interview other employees.[134] Moreover, MSPB permits an employee to utilize all the discovery mechanisms of the FRCP, and hence, at the appellate level a federal employee has substantial discovery rights.[135] The failure to furnish discovery places an accused employee at a severe disadvantage.[136] It is difficult to understand why parties in civil and criminal proceedings are entitled

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[128]In the landmark case of Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

[129]CAL. PENAL CODE § 859 (Deering 1982).

[130]ILL. ANN. STAT. ch. 110A, Rule 412 (Smith-Hurd Supp. 1984).

[131]N.Y. CRIM. PROC. § 240.20 (McKinney Supp. 1986).

[132]*E.g.*, Murgia v. Municipal Court, 15 Cal. 3d 286, 124 Cal. Rptr. 204, 540 P.2d 44 (1975); *In re* Ferguson, 5 Cal. 3d 525, 96 Cal. Rptr. 594, 487 P.2d 1234 (1971); People v. Perez, 101 Ill. App. 3d 64, 427 N.E.2d 820 (1981); People v. Ingram, 91 Ill. App.3d 1074, 415 N.E.2d 569 (1983); People v. Wallert, 98 A.D.2d 47, 469 N.Y.S.2d 772 (1983); WAXNER, NEW YORK CRIMINAL PRACTICE, ¶ 14.2(2) (1985).

[133]It is rare for a statute governing disciplinary proceedings to explicitly provide for discovery, and thus, most statutes are silent governing discovery. *E.g.*, ILL. ANN. STAT. ch. 24, §§ 10-1-18 & 18.1 (Smith-Hurd Supp. 1985); MASS. ANN. LAWS ch. 31, § 41 (Michie/Law Co-op. 1983); MICH. COMP. LAWS ANN. § 38.416 (West 1985); MINN. STAT. ANN. § 43A.33 (West Supp. 1985); N.Y. CIV. SERV. LAW § 75 (McKinney 1983); OHIO REV. CODE ANN. § 124.34 (Page 1984); 5 C.F.R. § 752 *et seq.* (1985).

[134]California Government Code Section 19574.1 states:

> An employee . . . shall have the right to inspect any documents in the possession of or under the control of the appointing power which are relevant to the adverse action taken and which would constitute relevant evidence. . . . The employee or designated representative, shall also have the right to interview other employees having knowledge of the facts or omissions upon which the adverse action was based.

CAL. GOVT. CODE § 19574.1 (Deering Supp. 1986).

[135]Although at Adverse Action stage a federal employee is not entitled to discovery, at the MSPB a federal employee has extensive discovery rights. 5 C.F.R. § 1201.71 *et. seq.* (1985). Significantly, the regulations state:

> Proceedings before the Board shall be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed for preparation of the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of Board intervention.

5 C.F.R. § 1201.71 (1985).

In a MSPB proceeding, an employee is authorized to utilize the various discovery methods adopted by the Federal Rules of Civil Procedure; therefore, an employee may use interrrogatories, production or documents and things, and depositions. 5 C.F.R. § 1201.72(a) (1985).

[136]A prosecutor and inspector general are similar because both of them have at their disposal an arsenal of resources which enable them to diligently prepare a case against the accused. *Cf.*, Nakell, *Criminal Discovery for the Defense and the Prosecution — The Developing Constitutional Consideration*, 50 N.C.L. REV. 437, 439 (1972).

to conduct extensive discovery while accused employees in disciplinary proceedings possess negligible discovery rights.[137]

The policy concerns that dictate discovery in civil and criminal proceedings are also applicable to disciplinary proceedings. An accused employee needs to gather and assess all the material information in order to prepare for trial. Additionally, in order to enter into settlement negotiations, an accused employee must be cognizant of the merits of the agency's case. Thus, an accused employee should be afforded the opportunity to conduct discovery.

In structuring discovery procedures for disciplinary proceedings, heed must be taken of the state's need for administrative efficiency.[138] Accordingly, these discovery procedures should be less broad and extensive than those in civil and criminal proceedings. For example, an accused employee should be granted the right to inspect and copy all the pertinent, nonprivileged documents. Deposition of employees and other witnesses should be allowed,[139] and conducted pursuant to the law governing depositions in that jurisdiction.[140] These procedures would enable an accused employee to gather information, and would not impede the administrative efficiency of the state.

VI. THE BURDEN OF PROOF IN DISCIPLINARY PROCEEDINGS

A. *Introduction*

The term burden of proof in this discussion means the burden of persuading the factfinder that the alleged fact is true.[141] The function of the burden of proof is to guide the factfinder regarding the degree of belief that he must possess to make a factual determination in a particular type of proceeding.[142] The burden of proof serves to allocate between the parties the risk of an incorrect determination.[143] The different types of burdens of proof are: the preponderance of the evidence; clear and convincing evidence; and proof beyond a reasonable doubt.[144]

1. The Preponderance of the Evidence

The preponderance of the evidence standard is the least rigorous burden

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[137] In a disciplinary proceeding, an employee can be dismissed from his employment. The loss of a civil service position may be the most important property interest that an individual may possess; thus, it is difficult to comprehend why the employee's discovery rights are so sparse.

[138] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[139] *See* CAL. GOVT. CODE § 19574.1 (Deering Supp. 1986); 5 C.F.R. § 1201.72(a) (1985).

[140] *See* 5 C.F.R. § 1201.72(a) (1985).

[141] Abilene Sheet Metal, Inc. v. NLRB 619 F.2d 332, 339 (5th Cir. 1980); MCCORMICK ON EVIDENCE § 336 (3d ed. 1984).

[142] *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring).

[143] Addington v. Texas, 441 U.S. 418, 423 (1979). In *Addington*, the Court held that the burden of proof in an indefinite involuntary civil commitment proceeding was clear and convincing evidence on account of the significant liberty interests involved.

[144] MCCORMICK ON EVIDENCE § 339 (3d ed. 1984).

of proof,[145] and it is the standard of proof utilized in civil proceedings.[146] In discussing the preponderance of the evidence standard, the Supreme Court has observed:

> At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.[147]

2. Clear and Convincing Evidence

The clear and convincing standard is the intermediate standard of proof.[148] The Supreme Court has made the following comments concerning this standard:

> The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.[149]

The clear and convincing standard is utilized in civil actions pertaining to fraud and moral turpitude.[150]

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[145] James, *Burdens of Proof*, 47 VA. L. REV. 51, 54 (1961).

[146] U.S. v. F/V Repulse, 688 F.2d 1283, 1284 (9th Cir. 1982); Drummond v. City of Redondo Beach, 255 Cal. App. 2d 715, 63 Cal. Rptr. 497 (1982); Ettinger v. Bd. of Medical Quality Assurance, 135 Cal. App. 3d 856, 185 Cal. Rptr. 601 (1982); White v. Production Credit Association, 76 Mich. App. 191, 256 N.W.2d 436 (1977); Rinaldi & Sons, Inc. v. Wells Fargo Alarm Services, Inc., 39 N.Y.2d 191, 383 N.Y.S.2d 256, 347 N.E.2d 618 (1976); Jarret v. Madifari, 67 A.D.2d 396, 415 N.Y.S.2d 644 (1979).

In Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), the Supreme Court held that the burden of proof in a Rule 10b-5 action was the preponderance of the evidence. The Court reasoned that a Rule 10(b) action is a civil action in which monetary damages are at issue. Further, although allegations of fraud are involved, Rule 10(b) is remedial, and thus, to impose the clear and convincing evidence standard would undermine the intent of Congress.

See also F. JAMES & G. HAZARD, CIVIL PROCEDURE Section 7.6 (2d ed. 1977); 30 AM. JUR. 2d *Evidence* § 1164 (1967); 9 WIGMORE EVIDENCE § 2498 (3d ed. 1940).

[147] *Addington*, 441 U.S. at 423. When the preponderance of the evidence is employed the factfinder "must believe that it is more probable that the facts are true or exist than it is that they are false or do not exist; but it is not necessary to believe that there is a high probability that they are true or exist, or necessary to believe to a point of almost certainly or beyond a reasonable doubt, that they are true or exist or necessary to believe that they certainly are true or exist." McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 261 (1944) (hereinafter cited as McBaine).

The Supreme Court has held that in SEC disciplinary proceedings the burden of proof is the preponderance of the evidence. Steadman v. SEC, 450 U.S. 91 (1981). Justice Brennan, writing for the majority, emphasized that the language of Section 7(c) of the Administrative Procedure Act, which mandated the Commission's findings supported by "reliable, probative and substantial evidence."

[148] *Addington*, 441 U.S. at 424 (1979). *See also* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (clear and convincing evidence necessary to terminate parental rights); Woodby v. Immigration & Naturalization Service, 385 U.S. 276, 285-86 n. 18 (clear and convincing evidence is the standard of proof in deportation hearings).

[149] *Addington*, 441 U.S. at 424. *See also* Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983).

[150] *Addington*, 441 U.S. at 424; *Woodby*, 385 U.S. at 285-86 n. 18; 30 AM. JUR. 2d 1167 (1967); 9 WIGMORE EVIDENCE 2498 (3d ed. 1940). Clear and convincing evidence is employed in actions involving oral contracts

3. Proof Beyond a Reasonable Doubt

The most rigorous burden of proof is proof beyond a reasonable doubt,[151] which is used in criminal proceedings. Justice Frankfurter made the following remarks pertaining to the function of proof beyond a reasonable doubt: "[I]t is the duty of Government to establish . . . guilt beyond a reasonable doubt. This notion — basic in our law and rightly one of the boasts of a free society — is a requirement and a safeguard of due process of law in the historic procedural content of due process."[152]

B. *The Preponderance of the Evidence Standard of Proof Should be Employed in Employee Disciplinary Proceedings*

Most of the statutes governing the procedure in disciplinary proceedings are silent concerning the quantum of proof necessary to prove disciplinary charges.[153] The burden of proof in a particular type of proceeding is determined

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to make a will. Lindley v. Lindley, 67 N.M. 439, 443, 356 P.2d 455, 457 (1960). Moreover, the clear and convincing standard is applicable to controversies involving the establishment of the provisions of a lost will. *In re* Ainscow's Will, 42 Del. 3, 8, 27 A.2d 363, 365 (1942). The clear and convincing standard has been used in a proceeding to terminate the use of a respirator. Eicher v. Dillon, 73 A.D.2d 431, 469, 426 N.Y.S.2d 517, 545 (1980). In addition, clear and convincing evidence has been required in an action brought by an illegitimate child to be declared an heir of his alleged father. Estate of Ragen, 79 Ill. App. 3d 8, 13, 398 N.E.2d 198, 202 (1978).

Under clear and convincing evidence, the factfinder:

> "must believe that it is highly probable that the facts are true or exist; while it is not necessary to believe to the point of almost certainly, or beyond a reasonable doubt that they are true or exist or that they certainly are true or exist; yet it is not sufficient to believe that it is merely more probable that they are true or exist than it is that they are false or do not exist."

McBaine, *supra* note 147, at 262-63.

[151]Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1302-04 (1977). In a criminal proceeding, the factfinder "must believe to a point of almost certainty, or beyond a reasonable doubt, the truth or existence of all the facts essential to constitute the crime charged or the facts asserted in civil actions or proceedings." McBaine, *supra* note 147, at 265.

In *In re* Winship, 397 U.S. 358 (1970), the Supreme Court held that proof beyond a reasonable doubt is mandatory during the adjudicatory phase when a juvenile is accused of an act which would constitute a crime if the act were committed by an adult. The Court emphasized that proof beyond a reasonable doubt decreases the possibility that an innocent person will be incarcerated. Further, the Court stressed the individual's paramount concern in maintaining his liberty. Proof beyond a reasonable doubt assists in preserving the liberty of innocent people. Moreover, the utilization of the reasonable doubt standard injects confidence in the community that the force of the criminal law will not be indiscriminately applied.

[152]Leland v. Oregon, 343 U.S. 790, 802-03 (Frankfurter, J. dissenting).

[153]*E.g.*, CAL. GOVT. CODE § 19570 *et. seq.* (Deering 1982); ILL. ANN. STAT. ch. 24, §§ 10-1-18 & 18.1 (Smith-Hurd Supp. 1985); MICH. COMP. LAWS ANN. § 38.416 (West 1985); MINN. STAT. ANN. § 43A.33 (West Supp. 1985); N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983); OHIO REV. CODE ANN. § 124.34 (Page 1984); WIS. STAT. ANN. § 230.34 (West Supp. 1985). Massachusetts had adopted the preponderance of the evidence as the burden of proof in disciplinary proceedings. MASS. ANN. LAWS ch. 31, § 43 (Michie/Law. Coop. 1983).

In adverse actions involving federal employees, the burden of proof is unspecified. 5 U.S.C. § 7501 *et. seq.* (West 1983). Nevertheless, the regulations governing the proceedings of the MSPB explicitly mandate the burden of proof applicable to its proceedings. 5 C.F.R. § 1201.56 (1985). The germane regulation states:

> "Under 5 U.S.C. § 7701(c)(1) the agency action must be sustained by the Board if:
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> (i) it is brought under 5 U.S.C. § 4303 and is supported by substantial evidence; or
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> (ii) it is brought under any other provision of law or regulation and is supported by the preponderance of the evidence."

5 C.F.R. § 1201.56(a)(1)(i) & (ii) (1985).

by the possibility of an error in the factfinding process and the nature of the proceeding.[154] Moreover, in determining the correct standard of proof in disciplinary proceedings, heed must be taken of the criteria announced in *Mathews v. Eldridge,*[155] to determine whether the procedure complies with the due process clause.[156] The Court stated:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[157]

The private interests in a disciplinary proceeding are substantial. First of all, in a disciplinary proceeding an employee may be terminated.[158] Not only does the risk of the loss of income exist, but also pension rights and other important fringe benefits.[159] Moreover, if an employee is found guilty of misconduct or incompetence then the employee may be stigmatized or ostracized.[160] Indeed, a dismissed employee may be deemed a pariah, and hence, the private sector may be adverse to hiring him.

The current procedures are susceptible to erroneous determinations.[161] In most instances, the burden of proof is undefined,[162] and therefore, the factfinder, usually an administrative law judge, has been delegated the discretion of determining the quantum of evidence necessary to find the employee guilty of the charges.[163]

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[154]Santosky v. Kramer, 455 U.S. 745, 758 (1982).

[155]424 U.S. 319 (1976).

[156]*Id.* at 335.

[157]*Id.* at 335.

[158]*E.g.,* ILL. ANN. STAT. ch. 24, § 10-1-18 (Smith-Hurd Supp. 1985).

[159]An employee could lose his pension rights which could be a significant amount of money because some pensions are based on the salary that the employee earned during his last year of employment.

[160]California has an extensive list of what constitutes the basis for dismissal. Some of the grounds for termination are: dishonesty; drunkenness on duty; intemperance; wilful disobedience; and addiction to controlled substances. CAL. GOVT. CODE § 19572 (Deering Supp. 1986) Being found guilty of any one of these charges could adversely affect an employee's future, and thus, an employee has a significant interest in the outcome of a disciplinary proceeding. *See* Bishop v. Wood, 426 U.S. 341, 350 (1970) (Brennan, J., dissenting).

[161]New York Civil Service Law Section 75(2) is silent concerning the burden of proof in disciplinary proceedings; however, to rectify this inadequacy the New York City Department of Sanitation has adopted the preponderance of the evidence as the standard of proof in disciplinary proceedings involving its employees. J. FERDINAND, CITY OF NEW YORK DEPARTMENT OF SANITATION MANUAL OF PROCEDURES FOR THE CONDUCT OF DISCIPLINARY ACTIONS 12 (1985).

[162]The statute that regulates adverse actions against federal employees is reticent concerning the amount of evidence that must be produced to find an employee guilty. 5 U.S.C. § 7501 *et seq.* (1983).

[163]For example, the New York Civil Service Law does not mandate the burden of proof, and therefore, a factfinder may employ the standard of proof that she deems appropriate.

The government has a significant interest in employee disciplinary proceedings.[164] The government has a vital interest in maintaining employee discipline since a disruptive employee could impede an agency's efficiency.[165] Furthermore, there is the important consideration of the costs that the implementation of a new procedure would entail.[166] Accordingly, any new procedure must facilitate swift but fair justice.

The preponderance of the evidence is the minimum standard of proof, and it is the standard employed when monetary sanctions are imposed.[167] The preponderance of the evidence does not present a radical departure from present procedure because some agencies already utilize this standard in disciplinary proceedings.[168] In addition, the preponderance of the evidence may be the minimum quantum of proof under the due process clause.[169]

An argument could be made for imposing the clear and convincing standard because some disciplinary proceedings involve allegations of fraud.[170] Nevertheless, by mandating the clear and convincing evidence standard, the policy considerations underlying disciplinary proceedings would be hindered because this standard of proof would create an impediment to the efficient operation of government.[171] Accordingly, the standard of proof which should be employed in employee disciplinary proceedings is the preponderance of the evidence.

VII. DISCIPLINARY PROCEEDINGS

A. *A Neutral Forum is Necessary*

Some statutes regulating disciplinary hearings fail to detail which government agency will conduct the hearing;[172] therefore, some government agencies conduct disciplinary proceedings involving their employees.[173] Allowing agencies to administer disciplinary proceedings involving their own employees is in-

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[164] Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

[165] *Id.*

[166] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[167] U.S. v. F/V Repulse, 688 F.2d 1283, 1284 (9th Cir. 1982). *See also* U.S. v. Ward, 448 U.S. 242 (1980).

[168] Massachusetts had adopted the preponderance of the evidence as the standard of proof in disciplinary proceedings. MASS. ANN. LAWS ch. 31, § 43 (Michie/Law. Coop. 1983). Moreover, in some proceedings in the MSPB employs the preponderance of the evidence as the burden of proof. 5 C.F.R. § 1201.56(a)(1)(ii) (1985).

[169] "It suffices for present purposes simply to recall that in American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation." Carlton v. FTC, 543 F.2d 983, 987 (D.C. Cir. 1976).

[170] *E.g.*, CAL. GOVT. CODE § 19572(a) (Deering Supp. 1986).

[171] Disciplinary proceedings are remedial, and thus, they are intended to have a salutary effect on the operation of government. By employing the intermediate standard of review, clear and convincing evidence, the government would be unable to prove many cases, and therefore, various malefactors would be exculpated.

[172] *E.g.*, N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983).

[173] For example, the New York City Department of Sanitation has a Department of Trials which is responsible for presiding over disciplinary proceedings.

equitable[174] on account of the administrative law judge and the prosecuting attorney are members of the same governmental agency.[175] The trial judge may, consciously or subconsciously, adopt the values and policies of the agency as being correct.[176]

Some jurisdictions provide that a personnel board[177] or civil service commission[178] will preside over employee disciplinary proceedings.[179] For example, in California the state personnel board is responsible for employee disciplinary proceedings, and it receives its authority from the California Constitution.[180] Moreover, some civil service commissions were created to address special employee disciplinary proceedings.[181] Significantly, the Merit Systems Protection Board (MSPB) reviews Adverse Actions against federal employees, and its procedures are designed to guarantee that a federal employee has an impartial hearing because the MSPB is an independent body.[182] In addition, if a federal employee believes that the presiding official is biased, the employee may make a motion to disqualify the presiding official.[183]

A neutral forum for the determination of employee disciplinary proceedings is essential.[184] Therefore, it is preferable for a civil service commission to conduct disciplinary hearings instead of the government agency that filed disciplinary charges against the employee.[185] Additionally, an employee or agency

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[174]In *Arnett*, Justice White commented that it was improper for the person whom Mr. Kennedy accused of malfeasance to be conducting the disciplinary hearing. 416 U.S. at 196-97 (White, J., concurring and dissenting).

[175]For example, in disciplinary proceedings conducted by the New York City Department of Sanitation the administrative law judge and the department advocate are members of the same agency.

[176]Administrative law judges are members of the bureaucracy, and this, their ability to ascend in the bureaucracy is dependent upon how they are perceived by their superiors. Consequently, there is inherent pressure to adhere to the values of the agency.

[177]CAL. CONST. art. XXIV, §§ 2(a) & 3(a).

[178]ILL. ANN. STAT. ch. 24 §§ 10-1-1 & 18 (Smith-Hurd Supp. 1985).

[179]The City of New York has established the Office of Administrative Trials and Hearings (OATH) to conduct disciplinary hearings pursuant to the New York Civil Service Law. CITY OF NEW YORK MAYOR'S EXEC. ORDER NO. 32 (1979). OATH provides a neutral forum because it is an independent agency.

[180]CAL. CONST. art. XXIV, §§ 2(a) and 3(a).

[181]*E.g.*, Illinois has created a Police Board to conduct disciplinary hearings pertaining to police personnel in cities with populations greater than 500,000 residents. ILL. ANN. STAT. ch. 24, § 10-1-18.1 (Smith-Hurd Supp. 1985). The policy behind creating a police board is that are disciplinary problems which are unique to police departments; therefore, to properly address these special problems different procedures must be utilized.

[182]5 U.S.C. § 1101 *et seq.* (1983).

[183]5 C.F.R. § 1201.42(b) (1985).

[184]Massachusetts recognizes that an agency may be unable to conduct an unbiased hearing; therefore, Massachusetts has established alternate procedures to allow a disinterested body to conduct the hearing. MASS. ANN. LAWS ch. 31, § 41A (Michie/Law Co-op. Supp. 1985).

[185]The government agencies should retain the inspector generals to conduct investigations regarding malfeasance. The inspector generals are sensitive to agency policy and goals, and hence, they are able to articulate and implement effective discipline.

Various statutes permit an employee to appeal an adverse determination to another adjudicatory body and receive either a trial or appellate type hearing. *E.g.*, MASS. ANN. LAWS ch. 31, § 43 (Michie/Law. Coop. 1983) (impartial review of determinations made by appointing authority); MICH. COMP. LAWS ANN. § 38.416 (West 1985) (employee entitled to produce evidence at a hearing conducted by the county civil service com-

should have the right to make a motion to disqualify a biased administrative law judge.[186] These procedures would insure that at the hearing level the employee would receive a fair hearing devoid of any internal agency politics.

B. *The Technical Rules of Evidence Should be in Effect in Disciplinary Hearings*

In disciplinary hearings under Section 75(2) of the New York Civil Service Law, the technical rules of evidence may be waived.[187] The judiciary has reaffirmed this principle that the technical rules of evidence are waived in disciplinary proceedings.[188] On occasion the courts have intervened to preclude the inclusion of tainted evidence in disciplinary proceedings because the inclusion of such evidence would violate the employee's right to due process.[189] The MSPB has its own rules of evidence;[190] however, the presiding official has an enormous amount of discretion in deciding whether the evidence should be allowed in the record.[191]

It is difficult to justify the practice of waiving the technical rules of evidence in disciplinary proceedings.[192] Importantly, by allowing the rules of evidence to be relaxed, the legislature has increased the agency's control over employee disciplinary proceedings.[193] The rules of evidence applicable in non-jury trials should be applicable to employee disciplinary proceedings.[194]

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mission); MINN. STAT. ANN. § 43A.33(4) (West Supp. 1985) (hearing before a neutral administrative law judge).

A federal employee may appeal an adverse action to the MSPB, and the employee will receive a hearing. 5 C.F.R. § 1201.11 *et seq.* (1985). Although the MSPB has appellate jurisdiction, in some instances, this may be the first opportunity for the employee to present testimony and cross examine adverse witnesses.

[186] *See* 5 C.F.R. § 1201.42(b) (1985).

[187] N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983). California also waives the technical rules of evidence in disciplinary proceedings. CAL. GOVT. CODE § 11513 (Deering Supp. 1986). The pertinent California statute states:

> The hearing need not be conducted according to the technical rules relating to evidence and witnesses. . . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

CAL. GOVT. CODE § 11513 (Deering Supp. 1986). Illinois prohibits the introduction of hearsay in administrative proceedings. Baehr v. Health and Hospital Governing Commission, 86 Ill. App. 2d 43, 407 N.E.2d 817 (1980); Spaulding v. Howlett, 59 Ill. App. 3d 249, 375 N.E.2d 437 (1978).

[188] Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972); Simpson v. Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274 (1975); Sowa v. Looney, 23 N.Y.2d 329, 296 N.Y.S.2d 760, 244 N.E.2d 1243 (1968). Multari v. Town, 99 A.D.2d 838, 472 N.Y.S.2d 439 (1984); Ronkese v. Bd. of Educ., 82 A.D.2d 1011, 442 N.Y.S.2d 176 (1981).

[189] Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972); Matter of Multari v. Town of Stony Point, 99 A.D.2d 838, 472 N.Y.S.2d 439 (1984).

[190] 5 C.F.R. § 1201.61 *et seq.* (1985).

[191] 5 C.F.R. § 1201.62 (1985).

[192] MCCORMICK ON EVIDENCE § 351 (3d ed. 1984).

[193] *Id.*

[194] *Id.*

C. *Examination of Witnesses and the Issuance of Subpoenas*

It is fundamental to due process that an employee have the opportunity to call witnesses on his behalf and be permitted to cross-examine adverse witnesses. Therefore, provisions should be made in the laws regulating employee disciplinary proceedings to allow an employee to subpoena witnesses, present favorable witnesses, and cross-examine adverse witnesses.[195] Further, the pertinent statutes should authorize representation for the accused during the course of the disciplinary hearing. Such representation is vital to enable an employee to defend himself.[196]

D. *The Decision Requirement*

It is basic to due process that a trial judge render a decision discussing the reasons for his ruling.[197] In discussing the function of the decision requirement, it has been observed:

> Fundamental to the concept of procedural due process is the right to a reasoned explanation of government conduct that is contrary to the expectations the government has created by conferring a special status on the individual. The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so.[198]

Accordingly, California,[199] Illinois,[200] New York[201] and the MSPB[202] require that the administrative law judge render a written decision.[203] The decision require-

[195]CAL. GOVT. CODE §§ 19578 & 19580 (Deering Supp. 1986); Piotroski v. State Police Merit Board, 85 Ill. App. 3d 369, 406 N.E.2d 863 (5th Dist. 1980); *cf.*, Goranson v. Dept. of Registration, 92 Ill. App. 3d 496, 415 N.E.2d 1249 (1980); *cf.*, Lakeland Const. Co. v. Dept. of Revenue, 82 Ill. App. 3d 1036, 379 N.E.2d 859 (1978). The New York Court of Appeals has stated:

> . . . [I]ncluded in the fundamental requirement of a fair trial, absent waiver, is the entitlement of the party whose rights are being determined to be fully appraised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents, and offer into evidence in rebuttal or explanations.

Simpson v. Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274 (1975). *See also* Hecht v. Monaghan, 307 N.Y. 461, 470, 121 N.E.2d 421, 425 (1952).

[196]ILL. ANN. STAT. ch. 24, § 10-1-18 (Smith-Hurd Supp. 1985); N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983); 5 C.F.R. § 1201.31(a) (1985).

[197]SEC v. Chenery, 318 U.S. 80 (1943). *See also In re* Strum, 11 Cal. 3d 258, 113 Cal. Rptr. 361, 521 P.2d 97 (1974); Flynn v. Bd. of Fire & Police Comm'rs, 33 Ill. App. 3d 394, 342 N.E.2d 298 (1975); Pachucki v. Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917 (1977).

[198]Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 77-78 (1976).

[199]CAL. GOVT. CODE §§ 19582 & 19583 (Deering 1982).

[200]ILL. ANN. STAT. ch. 24, § 10-1-18 (Smith-Hurd Supp. 1986).

[201]N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983).

[202]5 C.F.R. § 1201.111 (1985). *See also*, MASS. ANN. LAWS ch. 31, § 41 (Michie/Law. Co-op. 1983); MICH. COMP. LAWS ANN. § 38.416 (West 1985).

[203]A decision allows an accused employee to determine whether the administrative body's actions were arbitrary and capricious, and thus, subject to review by a higher authority. *See* Allied Delivery Sys. v. Ill. Commerce Comm'n, 93 Ill. App. 3d 656, 417 N.E.2d 777 (1981); Montauk Improvements v. Procacing, 41 N.Y.2d 913, 394 N.Y.S.2d 619, 363 N.E.2d 344 (1977).

ment protects employees who have expressed unpopular views from summary termination.[204]

A written decision permits review by a higher body,[205] and the lack of such decision will result in the administrative law judge's determination being reversed.[206] A written decision must contain findings of fact, and the decision must be based upon the evidence contained in the record.[207] Moreover, it is imperative to have a transcript of the disciplinary proceeding to insure that the reviewing body has a record to review to determine whether there was sufficient evidence to justify a finding of guilt or innocence.[208] Consequently, any statute regulating employee disciplinary proceedings should contain a provision mandating that there be a verbatim transcript of the proceedings and that the administrative law judge issue a written decision.[209]

VIII. JUDICIAL REVIEW OF DISCIPLINARY PROCEEDINGS

A. *Introduction*

California,[210] Illinois,[211] New York,[212] and the MSPB[213] provide for judicial review of employee disciplinary proceedings.[214] Judicial review is necessary to insure that an employee will have a remedy for an arbitrary decision.[215]

B. *Judicial Review of Administrative Determinations Made by the California State Personnel Board*

Judicial review of decisions made by the state personnel board are regulated by California Civil Procedure Code Section 1094.5.[216] The reviewing

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[204] *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974) (employee contended that the reason why he was disciplined was because he accused his superior with malfeasance); Bd. of Regents v. Roth, 408 U.S. 564 (1972) (employee alleged the reason why he was not retained was on account of his political beliefs.)

[205] Foxluger v. Gossin, 75 A.D.2d 1014, 429 N.Y.S.2d 329 (1980).

[206] Fair Employment Practice Comm'n v. California State Bd. of Personnel, 117 Cal. App. 3d 322, 172 Cal. Rptr. 739 (1981); Reinhardt v. Bd. of Educ., 61 Ill. 2d 101, 329 N.E.2d 218 (1975).

[207] 5 C.F.R. § 1201.111(b)(1) (1985).

[208] "A verbatim record made under the supervision of the presiding official shall be kept of every hearing and shall be the sole official record of the proceeding." 5 C.F.R. § 1201.53(a) (1985).

[209] Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

[210] CAL. CIV. PRO. § 1094.5 (Deering Supp. 1986).

[211] ILL. ANN. STAT. ch. 110, § 3-110 (Smith Hurd 1983).

[212] N.Y. CIV. SERV. LAW § 76(1) (McKinney 1983).

[213] 5 U.S.C. § 7703(a)(1) (1983).

[214] Ohio limits judicial review in cases involving nonuniformed civil servants to proceedings where removal or a pay decrease is at issue. OHIO REV. CODE ANN. § 124-34 (Page 1984).

[215] MASS. ANN. LAWS ch. 31, § 44 (Michie/Law Coop. 1983).

[216] CAL. CIV. CODE § 1094.5 (Deering Supp. 1986). Section 1094.5(b) defines the purview of the inquiry on appeal:

> The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there has been a fair trial; and whether there was any

court must affirm the factual determinations of the state personnel board if the factual determinations are supported by substantial evidence.[217] A court may not substitute its opinion for the penalty imposed by the state personnel board.[218] Moreover, a reviewing court is required to review the evidence in the most favorable light to the state personnel board, granting the state personnel board every reasonable inference and resolving all disputed issues in the board's favor.[219] The nature of the penalty imposed by the state personnel board is a discretionary act; therefore, the penalty will not be disturbed by a reviewing court unless there has been an abuse of discretion.[220] The criteria for determining whether there has been an abuse of discretion is the following:

> In considering whether an abuse of discretion occurred in the discipline of a public employee, the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service. Other facts include the circumstances surrounding the misconduct and likelihood of its recurrence.[221]

Judicial review of employee disciplinary proceedings in California reflects the philosophy that the Personnel Board is the administrative agency authorized to administer discipline to public employees, and unless there is an egregious error, the determination of the state personnel board must be affirmed.[222]

C. *Judicial Review of Employee Disciplinary Proceedings in Illinois*

The permissible purview of judicial inquiry of civil service employee disciplinary proceedings is defined by Civil Practice Section 3-110.[223] On review,

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> prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law the order or decision is not supported by the findings, or the findings are not supported by the evidence.

Id.

[217]Sheperd v. State Personnel Bd., 48 Cal. 2d 41, 307 P.2d 4 (1957); Goggin v. State Personnel Bd., 156 Cal. App. 3d 600, 137 Cal. Rptr. 387 (1977); Peradotto v. State Personnel Bd., 25 Cal. App. 3d 30, 101 Cal. Rptr. 595 (1972). The substantial evidence test has been defined as the following: "Under the substantial evidence test, the findings of the administrative agency must be upheld if, after reviewing the record, the trial court determines that substantial evidence exists supporting the agency's findings." Harlow v. Carleson, 16 Cal. 3d 731, 735, 129 Cal. Rptr. 298, 548 P.2d 698 (1976).

[218]Nightingale v. State Personnel Bd., 7 Cal. 3d 507, 102 Cal. 758, 498 P.2d 1006 (1972); Caveness v. State Personnel Bd., 113 Cal. App. 3d 617, 170 Cal. Rptr. 54 (1980).

[219]Wilson v. State Personnel Bd., 58 Cal. App. 3d 865, 130 Cal. Rptr. 292 (1976); Bodenschatz v. State Personnel Bd., 15 Cal. App. 3d 775, 93 Cal. Rptr. 471 (1971); Gee v. State Personnel Bd., 5 Cal. App. 3d 713, 85 Cal. Rptr. 762 (1970).

[220]Barber v. State Personnel Bd., 18 Cal. 3d 395, 134 Cal. Rptr. 206, 556 P.2d 306 (1976).

[221]Fout v. State Personnel Bd., 136 Cal. App. 3d 817, 821, 186 Cal. Rptr. 452, 454 (1982).

[222]Sheperd v. State Personnel Bd., 48 Cal. 2d 41, 307 P.2d 4 (1957).

[223]ILL. ANN. STAT. ch. 110, § 3-110 (Smith-Hurd 1983). Section 3-110 states:

> Every action to review any final decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support or opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The

the factual determinations of an administrative body are "prima facie true and correct."[224] A court may reverse an administrative agency's decision if the determination is against the manifest weight of the evidence.[225] The reviewing court may not substitute its opinion for that of the administrative agency even though the court disagrees with the determination of such agency.[226] Thus, a court may not reevaluate the evidence or make an independent determination.[227]

An administrative decision concerning an employee disciplinary proceeding is against the manifest weight of the evidence when the conclusions contrary to those reached by the administrative body are clearly evident.[228] The mere fact that an opposite conclusion could be reached is insufficient to overturn a decision pertaining to employee discipline.[229] Nevertheless, when the administrative decision lacks an evidentiary foundation, then the reviewing court is empowered to reverse the agency's order.[230] The judiciary has imposed stringent standards on judicial review of employee disciplinary proceedings because the legislature created municipal civil service commissions and the police board to administer employee disciplinary proceedings.[231] Consequently, great deference is accorded to the determinations of the municipal civil service commissions and the police board.[232]

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findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

Id.

[224]Mihalopoulos v. Bd. of Fire & Police Commissioners, 60 Ill. App. 3d 590, 376 N.E.2d 1105 (1978); Moore v. Chicago Police Bd., 42 Ill. App. 3d 343, 355 N.E.2d 745 (1976).

[225]Basketfield v. The Police Board, 56 Ill. 2d 351, 307 N.E.2d 371 (1974); McHugh v. Civil Service Comm'n, 68 Ill. App. 3d 575, 386 N.E.2d 573 (1979); Sircher v. Police Bd., 65 Ill. App. 3d 19, 382 N.E.2d 325 (1978).

[226]De Grazio v. Civil Service Comm'n, 31 Ill. 2d 482, 202 N.E.2d 522 (1964); Okino v. Dept. of Corrections, 84 Ill. App. 3d 1084, 405 N.E.2d 1369 (1980); Zions v. Police Board, 67 Ill. App. 3d 680, 385 N.E.2d 51 (1978).

[227]Mack v. Cook County Police and Corrections Merit Bd., 94 Ill. App. 3d 227, 418 N.E.2d 788 (1981); Sircher v. Police Bd., 65 Ill. App. 3d 19, 382 N.E.2d 325 (1978).

[228]McCabe v. Dept. of Registration, 90 Ill. App. 3d 1123, 413 N.E.2d 1353 (1980); Keen v. Police Bd., 73 Ill. App. 3d 65, 391 N.E.2d 190 (1979); Strawbridge v. State Dept. of Law Enforcement, 70 Ill. App. 3d 229, 388 N.E.2d 203 (1979); Hargett v. Civil Service Comm'n, 49 Ill. App. 3d 856, 365 N.E.2d 213 (1977).

[229]Okino v. Dept. of Corrections, 84 Ill. App. 3d 1084, 405 N.E.2d 1369 (1980); Keen v. Police Bd., 73 Ill. App. 3d 65, 391 N.E.2d 190 (1979); Zions v. Police Bd., 67 Ill. App. 3d 680, 385 N.E.2d 51 (1978); Dante v. Police Bd., 43 Ill. App. 3d 499, 357 N.E.2d 549 (1978).

[230]Kerr v. Police Bd., 59 Ill. 2d 140, 319 N.E.2d 478 (1974); McHugh v. Civil Service Comm'n 68 Ill. App. 3d 575, 386 N.E. 2d 573 (1979); Tinner v. Police Bd., 62 Ill. App. 3d 204, 378 N.E.2d 1166 (1978). An example of when an agency's determination is devoid of sufficient evidence is Kerr v. Police Bd. In *Kerr*, the determination of the Police Board was reversed because the Police Board's determination was based on uncorroborated evidence.

[231]Taylor v. Police Bd., 62 Ill. App. 3d 486, 378 N.E.2d 1160 (1st Dist. 1978).

[232]Courts are reluctant to interfere with the determinations of civil service commissions, and this is especially true when the administrative body is responsible for police discipline. The police are considered a paramilitary organization with a stringent code of conduct. Police disciplinary matters are usually handled by special administrative tribunals. *E.g.*, ILL. ANN. STAT. ch. 24, § 10-1-18.1 (Smith-Hurd Supp. 1985).

D. *Judicial Review of Employee Disciplinary Proceedings in New York*

1. Introduction

In New York, an aggrieved employee may appeal a decision entered in a disciplinary proceeding to either a civil service commission or to a state Supreme Court.[233] For purposes of the scope of review, it is consequential which forum the employee selects to file his appeal because a civil service commission has more latitude in modifying a decision reached in a disciplinary proceeding.[234]

2. Direct Review by the Judiciary of a Penalty Imposed Pursuant to Civil Service Law Section 76

Pursuant to Civil Service Law Section 76, an employee may appeal a decision imposing a disciplinary penalty directly to the Supreme Court of New York.[235] The reviewability of the disciplinary order is governed by Civil Practice Law and Rules Section 7803.[236] If a determination is arbitrary and capricious, then the determination is subject to judicial review.[237] If substantial evidence exists in the record, the determination of the administrative agency will be affirmed by the reviewing court.[238] Substantial evidence exists where the rec-

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[233]N.Y. CIV. SERV. LAW § 76(1) (McKinney 1983). The pertinent part of the statute states:

> Any officer or employee believing himself a grieved by a penalty or punishment or demotion in or dismissal from the service, or suspension without pay, or a fine, imposed pursuant to section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal civil service commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules.

Id.

[234]New York Civil Service Law Section 76(3) empowers civil service commissions to affirm, modify and reverse penalties imposed in disciplinary proceedings. N.Y. CIV. SERV. LAW § 76(3) (McKinney 1983).

[235]N.Y. CIV. PRAC. LAW § 7803 (McKinney 1981).

[236]New York Civil Practice Law and Rules Section 7803 states:

> The only questions that may be raised in a proceeding under this article are:
> 1) whether the body or officer failed to perform a duty enjoined upon it by law; or
> 2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
> 3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed; or
> 4) whether a determination was made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

N.Y. CIV. PRAC. LAW § 7803 (McKinney 1981).

[237]Pell v. Bd. of Educ., 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); Sullivan County Harness Racing Ass'n. v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622, 283 N.E.2d 603 (1972); Hutchings v. Brezenoff, 95 A.D.2d 554, 467 N.Y.S.2d 382 (1983); Fanelli v. New York City Conciliation and Appeals Bd., 90 A.D.2d 756, 455 N.Y.S.2d 814 (1982), *aff'd*, 58 N.Y.2d 952, 447 N.E.2d 82 (1983); Italian Sons and Daughters of American, Inc. v Common Council, 89 A.D.2d 822, 453 N.Y.S.2d 962 (1982).

[238]Silberfarb v. Bd. of Co-op Educational Service, 60 N.Y.2d 979, 471 N.Y.S.2d 257, 459 N.E.2d 482 (1983); 300 Gramatan Avenue Associates v. State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183 (1978); Diotte v. Fahey, 97 A.D.2d 653, 469 N.Y.S.2d 191 (1983); Christie v. Hirsohn, 88 A.D.2d 598, 449 N.Y.S.2d 771 (1982).

ord contains factual support for the decision.[239] A court may not substitute its judgment for that of an administrative agency.[240] Therefore, courts defer to the findings, conclusions, and penalties meted out by administrative agencies.[241]

As to the penalty imposed in an employee disciplinary proceeding, the standard of review is whether the punishment is so disproportionate to the offense as to be shocking to one's sense of fairness.[242] In *Pell v. Board of Education,*[243] the New York State Court of Appeals announced the criteria for reviewing a punishment meted out by an administrative agency:

> [I]f the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed.[244]

The judiciary is reluctant to interfere with agency determinations because administrative officials are cognizant of the policy and goals of the agency, and the impact of employee disciplinary proceedings on the efficiency of the agency.[245] Consequently, an administrative agency is granted broad authority to

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[239]Bouley Associates, Ltd. v. State of New York Ins. Dept., 98 A.D.2d 521, 471 N.Y.S.2d 585 (1984); Cortland-Clinton, Inc. v. Dept. of Health, 59 A.D.2d 228, 399 N.Y.S.2d 492 (1977). Olean v. Levine, 40 A.D.2d 1065, 338 N.Y.S.2d 959 (1972). In 300 Gramatan Avenue Associates v. State Div. of Human Rights, 45 N.Y.2d 76, 408 N.Y.S.2d 54, 379 N.E.2d 1183 (1978), the court of appeals made the following comments concerning the substantial evidence rule:

> It is related to the charge or controversy and involves a weighing of the quality and quantity of the proof; it means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Masked by its substance — its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. (citations omitted.)

45 N.Y.2d at 180-81, 408 N.Y.S.2d at 56-57, 379 N.E.2d at 1186.

[240]Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956); Peconic Bay Broadcasting Corp. v. Board of Appeals, 99 A.D.2d 773, 472 N.Y.S.2d 21 (1984); Marsh v. Hanley, 50 A.D.2d 687, 375 N.Y.S.2d 409 (App. Div. 1972).

[241]Purdy v. Kreisberg, 47 N.Y.2d 354, 418 N.Y.S.2d 329, 391 N.E.2d 1307 (1979); Stubenhaus v. State Education Department, 88 A.D.2d 1102, 453 N.Y.S.2d 69 (1982).

[242]*Kreisberg,* 47 N.Y.2d 354, 418 N.Y.S.2d 329, 391 N.E.2d 1307 (1979); Harris v. Mechanicville Central School District, 45 N.Y.2d 279, 408 N.Y.S.2d 384, 380 N.E.2d 213 (1978); Pell v. Board of Ed., 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); Papadakis v. Brezenoff, 103 A.D.2d 704, 478 N.Y.S.2d 4 (1984); Kaplan v. Board of Regents, 87 A.D.2d 952, 451 N.Y.S.2d 223 (1982).

[243]34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.3d 321 (1974).

[244]*Id.* at 235, 356 N.Y.S.2d at 842, 313 N.E.2d at 327. Seldom will the judiciary reverse a determination made in an employee disciplinary proceeding. But, in Harris v. Mechanicville Central School District, 45 N.Y.2d 279, 408 N.Y.S.2d 384, 380 N.E.2d 213 (1978), the court of appeals held that a dismissal penalty was disproportionate to the offense on account of the employee had committed only an act of insubordination. Moreover, the employee did not commit an act of moral turpitude or present a threat to the school district. Consequently, the penalty was reversed, and a less harsh sanction was imposed.

[245]Purdy v. Kreisberg, 47 N.Y.2d 354, 418 N.Y.S.2d 329, 391 N.E.2d 1307 (1979); Ahsaf v. Nyquist, 37 N.Y.2d 182, 371 N.Y.S.2d 705, 332 N.E.2d 880 (1975).

evaluate the facts in employee disciplinary proceedings, and the agency's determination will be affirmed if it is rationally based.[246] Hence, in New York, because of the enormous deference paid to administrative agencies, it is difficult to overturn the punishment imposed by such agencies.[247]

3. Judicial Review of Determinations Made by State and Municipal Civil Service Commissions

An aggrieved employee may appeal the decision of his initial hearing to a state or municipal civil service commission.[248] The civil service commission is authorized to affirm, reverse, or modify the determination of the administrative agency.[249] Determinations of the civil service commission are "final and conclusive, and not subject to final review in any court."[250] Despite this language, determinations made by a civil service commission are reviewable by the judiciary.[251] In addition, determinations of a civil service commission are subject to reversal only if the decision is arbitrary and capricious.[252]

When a civil service commission imposes a penalty, it is the reviewing court's duty to decide whether the punishment is so disproportionate to the offense committed as to shock one's sense of fairness.[253] The focus of the court's inquiry is on the civil service commission's determination instead of the administrative agency's determination.[254] The legislature vested civil service commissions with discretion to affirm, reverse, or modify penalties authorized by the administrative agency. Therefore, judicial review of civil service commission determinations must concentrate on the actions of the civil service commission and not on the administrative agency.[255] If the judiciary were able to scrutinize the actions of the agency rather than the civil service commission, then the purpose of allowing employees to appeal to a civil service commission would be eviscerated.[256]

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[246]Sag Harbor Union Free School District v. Helsby, 54 A.D.2d 391, 388 N.Y.S.2d 695 (1976).

[247]*E.g.*, Gailband v. Christian, 56 N.Y.2d 890, 454 N.Y.S.2d 401, 438 N.E.2d 126 (1982). In *Gailband*, the Court of Appeals reversed the decision of the Appellate Division, and reinstated the penalty imposed by the appointing agency. The Court of Appeals reasoned that the penalty imposed by the agency was not so disproportionate as to warrant modification.

[248]N.Y. CIV. SERV. LAW § 76(3) (McKinney 1983).

[249]*Id.*

[250]*Id.*

[251]Pauling v. Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16 (1974); Barbarito v. Moses, 31 A.D.2d 898, 297 N.Y.S.2d 831 (1969); Santella v. Hoberman, 29 A.D.2d 655, 286 N.Y.S.2d 647 (1968).

[252]Board of Education v. Cappola, 83 A.D.2d 751, 443 N.Y.S.2d 510 (1981); City Council of Watertown v. Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678 (1976); Pauling v. Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16 (1974).

[253]Board of Education v. Cappola, 83 A.D.2d 751, 443 N.Y.S.2d 510 (1981); City Council of Watertown v. Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678 (1976).

[254]City Council of Watertown v. Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678 (1976).

[255]Board of Education v. Cappola, 83 A.D.2d 751, 443 N.Y.S.2d 510 (1981).

[256]City Council of Watertown v. Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678 (1976).

4. The Civil Service Commission System of Review Should be Abolished

The concept of providing a neutral civil service commission is correct;[257] however, it is essential that an unbiased tribunal be furnished at the hearing level. The administrative law judge has the ability to listen to testimony, assess the credibility of witnesses, and render a decision. A civil service commission can only evaluate the record to determine whether the punishment is commensurate with the offense.[258] Hence, an independent agency or a special court with original jurisdiction should be created to preside over disciplinary proceedings.[259] Further, the creation of a new court would render civil service commissions unnecessary because employees would have a neutral forum. Moreover, the current bifurcated system of review of employee disciplinary proceedings would be abolished, leading to one standard of review. Therefore, more consistent review of employee disciplinary proceedings would occur.

E. *Judicial Review of Determinations of the Merit Systems Protaction Board*

Any decision of the MSPB is subject to judicial review if it is found that the findings or conclusions are found to be:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, regulation having been followed; or
(3) unsupported by substantial evidence.[260]

The United States Court of Appeals for the Federal Circuit has appellate jurisdiction for appeals involving determinations made by the MSPB.[261]

If the MSPB's determination is supported by substantial evidence, the determination will be affirmed.[262] Thus, it has been stated:

> Under the statutory standard of review, the court will not overturn an agency decision if it is supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'
>
> In determining whether the Board's decision is supported by substantial evidence, the standard is not what the court would believe on a *de novo*

[257]Municipal civil service commissions in New York State consist of three persons, and no more than two commissioners can be from the same political party. In addition, each member is appointed by the mayor or city manager for a six year term. N.Y. CIV. SERV. LAW § 15(1)(a) (McKinney 1983). These provisions are intended to insulate civil service commissions from political pressure, and thus, provide a neutral forum for the resolution of employee disciplinary proceedings.

[258]N.Y. CIV. SERV. LAW § 76(3) (McKinney 1983).

[259]An independent agency similar to the New York City Office of Trials and Administrative Hearings should be established throughout New York State to preside over employee disciplinary hearings.

[260]5 U.S.C. § 7703(c) (1983).

[261]5 U.S.C. § 7703(b)(1) (1983).

[262]Brewer v. U.S. Postal Service, 647 F.2d 1093, 1096 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982). *See also* Consolidated Edison Co. v. NLRB, 305 U.S. 206 (1938); Weston v. U.S. Dept. of Housing and Urban Development, 724 F.2d 943 (D.C. Cir. 1983).

appraisal, but whether administrative determination is supported by substantial evidence on the record as a whole.[263]

A court in reviewing a sanction imposed by the MSPB is limited in its review.[264] Moreover, the judiciary will not substitute its opinion for the determination reached by the MSPB, unless the penalty is so excessive as to constitute an abuse of discretion.[265] The criteria for determining whether a penalty is excessive is the following:

> We have said that we will defer to the judgment of the agency as to the appropriate penalty for employee misconduct, unless its severity appears totally unwarranted in the light of such factors as the range of permissible punishment specified by statute or regulation, the disciplined party's job level and nature, his record of past performance, the connection between his job and the improper conduct charges, and the strength of the proof that the conduct occurred.[266]

Hence, unless there has been an abuse of discretion, the penalty meted out by the MSPB will be affirmed.[267]

IX. REIMBURSEMENT OF LOST WAGES AND ATTORNEYS FEES

An employee disciplinary proceeding can take several years to resolve because of the various appeals that are available to the litigants.[268] But, during the period that the case is being determined, an employee may be terminated and be without any income. Therefore, it is vital that an employee who is found innocent be reimbursed for lost wages while he was unjustly suspended or terminated. In New York, if an employee is reinstated by court order then that employee is entitled to back pay minus whatever compensation he earned during his forced absence from his employment.[269] California law provides that an employee reinstated by the California State Personnel Board may be reimbursed for lost compensation.[270] Massachusetts authorizes an employee who has successfully defended against a disciplinary proceeding to seek limited reimbursement of legal fees.[271] In a MSPB proceeding, attorneys fees may be awarded in the interests of justice.[272] Usually the circumstances that dictate the

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[263] *Brewer*, 647 F.2d at 1096.

[264] Swentek v. United States, 658 F.2d 791, 796 (D.C. Cir. 1981).

[265] Boyce v. United States, 543 F.2d 1290, 1292 (D.C. Cir. 1976).

[266] Giles v. United States, 553 F.2d 647, 650-51 (D.C. Cir. 1977).

[267] Gipson v. Veterans Administration, 682 F.2d 1004, 1011 (D.C. Cir. 1982).

[268] In a New York disciplinary proceeding the litigants could take four appeals: 1) the local civil service commission; 2) an article 78 proceeding in the Supreme Court; 3) an appeal to the Appellate Division of the Supreme Court; and 4) a final appeal to the New York Court of Appeals.

[269] N.Y. CIV. SERV. LAW § 77 (McKinney 1983).

[270] CAL. GOVT. CODE § 19584 (Deering 1982).

[271] MASS. STAT. ANN. ch. 31, § 45 (Michie/Law Co-op. 1983).

[272] 5 C.F.R. § 1201.37(a)(1) (1985).

awarding of legal fees are that the action was without merit, brought in bad faith, or brought to harass the employee.[273]

The purpose of a disciplinary proceeding is to punish a civil servant who has committed an infraction of the disciplinary rules; consequently, fairness and public policy dictate that an innocent employee should receive his salary for the period that he was disciplined minus any income derived from other sources. In addition, an employee should be entitled to reimbursement of legal fees if it is found that the disciplinary action was brought in bad faith[274] because the legal fees in a disciplinary proceeding may amount to an employee's life savings.

X. CONCLUSION

Statutes regulating employee disciplinary proceedings should provide for procedural due process. Disciplinary proceedings should be commenced by written notice served by either personal service or certified mail, and sufficient time should be granted to prepare an answer. Discovery should be conducted with an employee being allowed to inspect and copy all pertinent, nonprivileged documents; moreover, an employee should be permitted to depose witnesses. The rules of evidence should be enforced, and the administrative agency should have to prove its case by the preponderance of the evidence. The employee should also have the right to subpoena and call witnesses on his behalf, and the employee should have the right to cross-examine adverse witnesses.

The hearing should be conducted by a neutral agency, and a verbatim transcript of the hearing should be taken. Subsequent to the conclusion of the hearing, the administrative law judge should render a written decision. Review of the disciplinary proceeding should be by the trial court of general jurisdiction, and the standard of review should be whether the decision was arbitrary and capricious. An employee who is found innocent by an administrative law judge or reviewing court should be reimbursed for lost pay. Further, if it is found that a disciplinary proceeding was brought in bad faith, then the employee should be reimbursed for legal fees.

These recommendations are an attempt to impose fair and efficient procedures in disciplinary proceedings. Most of these recommendations are in effect in different jurisdictions, and hence, are not a radical departure from existing practice. In addition, these recommendations take into account the need for administrative efficiency, and thus, like all legislation involving procedural due process, these recommendations are a compromise between the needs of the state and the needs of the employee.

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[273]Steger v. Defense Investigative Service Department, 717 F.2d 1402 (D.C. Cir. 1983) *(per curiam).*

[274]*Id.*