FLYNN, J. dissenting. General Statutes § 52-418 assures a full and fair hearing to parties to an arbitration by expressly authorizing the Superior Court to vacate an award when an arbitration panel refuses to hear evidence pertinent and material to the controversy. Judge Hale, pursuant to § 52-418, properly vacated the arbitration award in this case because he found that the arbitration panel was guilty of misconduct in refusing to hear evidence, which was pertinent and material to the controversy, from Luis Rodriguez-Davila, the grievant, who had been discharged. The panel had refused to hear evidence that B, another employee guilty of more egregious conduct, who had actually voiced a threat in the workplace to another, received only a six month suspension, later reduced by another panel to thirty days, as opposed to the grievant Rodriguez-Davila's discharge. Judge Hale found that the evidence was pertinent to the remedy to be applied by the panel in determining whether the grievant was unjustly terminated from employment. Judge Hale's conclusion that the excluded evidence was "very pertinent to the question of remedy" is consistent with that principle of common law of arbitrability in labor cases, which recognizes that disparate or discriminatory application of an employee's discipline is one measure of whether a grievant was discharged for just cause, which can be determinative.[1] Two workplace incidents had occurred involving similar conduct. In them, both the grievant and B had similar histories of prior incidents and progressive discipline. Both the grievant and B were employed by the same city of Hartford, under the same union contract. One employee, B, who threatened another to " 'watch out' " was only suspended;[2] the grievant, who merely shouted, was fired. Judge Hale found that because the panel had allowed evidence as to the first incident involving B, evidence should also have been allowed as to the second incident involving B, which resulted only in B's suspension and is the basis of Rodriguez-Davila's claim. I agree and would affirm his thoughtful judgment vacating the award.

In Public Acts 1929, c. 65, § 11, codified as amended at § 52-418 (a) (3), the General Assembly provided that any party "to an arbitration" may apply to the Superior Court to vacate an award "if the arbitrators have been guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . ." The Hartford Municipal Employees Association, a labor union, was a party to an arbitration between it and the city of Hartford, arising out of the grievance of Rodriguez-Davila who had been fired. The contract contained a "just cause" dismissal provision.[3] It provided in pertinent part: "No employee can be reprimanded, suspended, demoted or discharged except for just

cause." There is no contractual definition between the union and the city of "just cause." In 1966, Arbitrator Carroll R. Daugherty issued an award in *Enterprise Wire Co.* v. *Enterprise Independent Union*, 46 Lab. Arb. Rep. (BNA) 359 (Mar. 28, 1966), where, in the absence of a contractual definition of just cause, he established a seven prong approach to determine whether just cause existed for discipline. Soon thereafter, other arbitrators adopted these standards, labeling them "Daugherty tests of just cause." So well respected and widely adopted have Daugherty's views become that the seven prongs are now an integral part of arbitral common law. C. Deitsch, "Jekyll and Hyde: The Split Personalities of a Public Sector Arbitrator," 30 J. Collective Negotiations in Pub. Sector 16 (2003).

The sixth prong of the Daugherty test is pertinent to the issues before us. It is: "Has the [employer] applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?" *Enterprise Wire Co.* v. *Enterprise Independent Union*, supra, 46 Lab. Arb. Rep. 364. This inquiry and the other prongs of Daugherty's test have long been used by the Connecticut state board of mediation and arbitration, which has taken evidence on whether disparate or discriminatory treatment has occurred in deciding "just cause" discipline cases. See *Evening Sentinel* v. *Ansonia Typographical Union*, *No. 285*, State Board of Mediation & Arbitration, Case No. 7071-A-175, p. 7 (May 26, 1971) (Weckstein, Arb.).[4] It continues to hear evidence on the sixth antidiscriminatory prong until the present day. When heard, it is often dispositive. In *New London* v. *International Assn. of Firefighters*, *IAFF*, *Local 1522*, State Board of Mediation & Arbitration, Case No. 9697-A-690, p. 3 (July 28, 1999) (Cain, Arb.), the board determined that the grievant firefighter's disparate treatment argument was well taken because in a separate, similar incident, another firefighter had not been discharged from employment. It found the grievant's employment was not terminated for "just cause" and ordered reinstatement. Id., p. 4. In another discharge case, *New Haven* v. *AFSCME*, *Council 4*, *AFL-CIO*, *Local 3144*, 90 Lab. Arb. Rep. (BNA) 1040, 1042 (1988) (Stacey, Arb.), the board ordered reinstatement of the grievant because she was treated in a disparate manner from others similarly situated who were granted time to change back residency within the city limits of New Haven. The panel found that the actions of the residency review board were "not uniform" in regard to the application for waiver, submitted to it by the grievant. Id. *International Brotherhood of Electrical Workers*, *Local Union 420* v. *Connecticut Light & Power Co.*, State Board of Mediation & Arbitration, Case No. 2010-A-0216 (April 27, 2010) (Weiner, Arb.) provides another example. In it, three experienced arbitrators on the Connecticut state board of mediation and arbitration, Chairman Gerald T. Weiner, and members Raymond Shea and David Ryan,

unanimously agreed that the disparity of punishment imposed on two workers for similar offenses was "not justified" where one was only suspended for two weeks and the grievant was fired. They ordered the grievant reinstated based on the antidiscriminatory sixth prong.

I do not suggest that an arbitrator is acting improperly in excluding evidence simply because someone sought to introduce evidence that was cumulative or irrelevant. But, the panel chair here did not claim that the evidence was cumulative or irrelevant. Instead, he said that the panel could not examine the second instance of B's workplace misconduct because "we'd have to bring in everybody." In *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 485, 899 A.2d 523, aff'd, 278 Conn. 466, 899 A.2d 523 (2006), a construction contract dispute, our Supreme Court held that denial of the opportunity to present evidence that the mayor was taking bribes, because it would take additional time, was not a proper reason. Taking time to listen to material and relevant evidence from the parties is what the panel of arbitrators is there for and that is what the arbitration statute contemplates that they do.

The panel chair also stated that his reason for not admitting the discipline B received for the second instance of workplace misconduct was that it was issued after the discipline issued to the grievant. "In 'disparate treatment' cases, the grievant's claim may be that he or she has been disadvantaged because other employees are currently being treated or in the past were treated in a more favorable manner . . . ." A. Koven & S. Smith, Just Cause: The Seven Tests 360 (3d Ed. 2006). I agree with Judge Hale's observation that it is difficult to see how the first discipline of B for similar conduct was admitted as relevant and material, but the second, less severe discipline of B imposed four months later for similar but more egregious conduct was excluded when the panel did not establish or determine that the second incident was irrelevant or cumulative.

It is well established that a party to an arbitration is entitled to a "full and fair hearing." *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, 203 Conn. 133, 149, 523 A.2d 1271 (1987). Each side to an arbitration must be given a full and fair opportunity to present material evidence that is not cumulative. *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 466. If the panel refuses evidence that is material, the challenging party must still show substantial prejudice, meaning that it was likely to affect the result. *Krassner* v. *Ansonia*, 100 Conn. App. 203, 208–209, 917 A.2d 70 (2007). Arbitrators have reinstated employees after listening to evidence of disparate treatment of similarly situated employees, evidence which the panel in the present case refused even to hear. These arbitration decisions, in which the arbitrators not only consider

but also rely on evidence of disparate discriminatory treatment of similarly situated employees to reinstate an employee who was terminated, support a showing of substantial prejudice. In the present case, Judge Hale found that the evidence is "very pertinent" to the question of remedy, which although not necessarily determinative, was important evidence. I believe these findings, recognizing that the remedy was the real issue to which the evidence pertained, satisfied the necessary showing of substantial prejudice. The *Krassner* v. *Ansonia* case emphasizes that to establish the substantial prejudice that one needs to show to vacate an award, it suffices if the excluded evidence is *likely* to affect the result. See id., 209. The burden is not to show that the evidence, if admitted, would have *dictated* the result with certainty.

I would affirm Judge Hale's judgment.

[1] "It is well understood in labor relations that discipline must not be arbitrary, capricious and discriminatory, that, for instance, like offenses must be treated in similar fashion." *Bridgeport* v. *Bridgeport Fire Fighters, IAFF, Local 834*, 97 Lab. Arb. Rep. (BNA) 327, 331 (1991) (Freedman, Arb.).

[2] Another employee described B as " 'aggressive' " and " 'very intimidating,' " who swore at her, taking issue that she wrote a report about him, and then warned her that "she better watch out."

[3] "In arbitration, termination is regarded as the industrial equivalent of capital punishment, therefore, this termination, to be sustained, must pass both the just cause test and also be procedurally correct." *Bridgeport* v. *Bridgeport Fire Fighters, IAFF, Local 834*, supra, 97 Lab. Arb. Rep. (BNA) 330.

[4] Recent case law dealing with a different issue also has mentioned without attribution the seven part *Enterprise Wire Co.* test in *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 6 A.3d 1142 (2010). "The [a]rbitrator utilized, as guidance in her deliberations, those certain elements of just cause that can be restated as follows:

"1. Was the employee forewarned of the consequences of [her] misconduct?

"2. Was the [e]mployer's rule or order reasonably related to safe and efficient operations?

"3. Did the [e]mployer, before administering the discipline, investigate to discover whether the employee did in fact violate or disobey a rule or order?

"4. Was the [e]mployer's investigation conducted fairly and objectively?

"5. Did the investigation produce substantial evidence or proof that the employee was guilty as charged?

"6. Has the [e]mployer applied its rules, orders and penalties evenhandedly and without discrimination?

"7. Was the degree of discipline reasonably related to the seriousness of the employee's proven offense and the employee's past record?" (Internal quotation marks omitted.) Id., 829–30.