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## Employee Refusals to Cooperate in Internal Investigations: "Into the Woods" with Employers, Courts, and Labor Arbitrators

*Marvin F. Hill, Jr.\**  
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### I. INTRODUCTION

A recurring fact pattern in employment relations involves the interrogation of employees by management in conjunction with an investigation of some nature. Common situations include the following:

Management experiences shortages of materials and decides to interrogate each employee working in the division where shortages occurred. Most, but

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not all, employees willingly participate in the investigation. Employees who refuse to answer management's questions are discharged.

Criminal charges are brought against two on-duty firefighters who, while working at a fair, allegedly sexually assaulted a 17-year-old woman. The department decides to conduct an investigation. Fearing that the state's attorney will act on anything they say, the alleged assailants refuse to answer management's questions and cite their fifth-amendment rights. The employees are terminated for sexual assault and failure to cooperate in an investigation.

An employee is suspected of being under the influence after a serious work-related accident. Management requests that the employee undergo a drug and a polygraph test, both of which are refused. The employee is discharged for refusing to submit to testing even though the parties' collective bargaining agreement is silent on the issue of drug and polygraph testing.

A school district charges a teacher with the theft of a copying machine. A grievance is filed and the case proceeds to arbitration under a tenure-teacher termination statute. At the arbitration hearing the school district calls the teacher as its first witness. The teacher's attorney objects to having his client be a witness for the other side. The employer argues that if the teacher does not testify, she will be terminated for failure to cooperate in an on-going investigation.

To what extent can an employee assert a fifth-amendment defense or otherwise refuse a demand to cooperate with an investigation of work-related misconduct? Does it make a difference whether the investigation requires a drug screen or a polygraph examination? Suppose the employee works for a government. When, if ever, will a labor arbitrator recognize a privilege for an employee who elects not to tell management his side of the story, either at an investigation or in a subsequent arbitration hearing? Even though an arbitrator recognizes a privilege, may (or should) an arbitrator draw an adverse inference from an employee's refusal to testify? What about an employee who has information, but, for whatever reason, refuses management's request to come forward and tell what he knows at an arbitration hearing? Is a refusal to cooperate in any form protected under the National Labor Relations Act?

This Article will address these and similar issues that arise when an employee elects not to cooperate in the face of a legitimate investigation by his employer. Part II reviews the law in the public sector regarding the rights and obligations of employees and employers in employment-related investigations. Part III focuses on the decisions of labor arbitrators. Interpreting "just cause" dismissal provisions contained in both public and private-sector collective bargaining agreements,<sup>1</sup> labor arbitrators "enter the woods" when

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1. Recent survey reports by the Bureau of National Affairs ("BNA"), Inc., reveal that discharge and discipline provisions are found in 96 percent of collective bargaining agreements analyzed—99 percent in manufacturing and 92 percent in non-

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management disciplines or discharges employees for refusing to cooperate (the term often used is "insubordination") and unions challenge the action through the negotiated grievance procedure.<sup>2</sup> The Article concludes with a policy

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manufacturing. BNA also reports that grounds-for-discharge provisions, found in 94 percent of their sample, are generally of two types—discharge for "cause" or "just cause" (found in 86 percent of the agreements), or discharge for a specific offense (found in 75 percent of the contracts in the database). BASIC PATTERNS IN UNION CONTRACTS (12th ed. 1989).

Even if no "just cause" provision is found in the collective bargaining agreement, the better weight of authority holds that absent a clear indication to the contrary, a just cause standard is implied in the labor agreement. See, e.g., B.F. Goodrich Tire Co., 36 Lab. Arb. (BNA) 552, 556 (1961) (Ryder, Arb.); Feller, *The Remedy Power in Grievance Arbitration*, 5 INDUS. REL. L.J. 128, 134-35 (1982).

Despite the high frequency of arbitration cases dealing with discharge and discipline (about one out of three grievances deals with discharge or discipline), few contracts contain a definition of "just cause." While no set criteria exists, arbitrators have uniformly held that any determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct or a serious or faulty lapse in job performance, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case.

Abrams and Nolan propose that "[j]ust cause . . . embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer's business by his activities on or off the job." Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 601.

The universal rule in grievance arbitration is that the employer must carry the burden of proof of just cause in a discharge case.

2. Disputes submitted to arbitration by unions and management are of two types: "interest" and "rights" disputes. Interest disputes involve disagreements over the terms of new collective bargaining agreements. "Rights" or grievance disputes concern disagreements over the meaning of the terms of an existing labor agreement. Most arbitration involves rights or contract interpretation disputes, although interest disputes are frequently arbitrated in the public sector. Also, arbitration can be either compulsory or voluntary. Compulsory arbitration occurs when the parties are legally mandated to arbitrate a dispute. Voluntary arbitration occurs when the parties agree to submit a dispute to an arbitrator. Compulsory arbitration imposes a specific process as a matter of law or decree. When arbitration is voluntary, the parties are free to formulate their own arbitration procedures. Most grievance arbitration is voluntary, either because the parties have agreed in advance to arbitrate all contract interpretation disputes or because the parties agree to arbitrate a particular dispute.

When the arbitrator issues a decision (also called an award), it may be final and binding, or it may be advisory. Most labor arbitration in the United States, and the type of arbitration referred to in this Article, is voluntary contract interpretation arbitration with the award being final and binding. Most authorities simply refer to this

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statement concerning what rule of law and focus arbitrators should adopt when confronted with duty to cooperate cases. Although public-sector cases recognize a privilege and apply fifth-amendment law more readily than private-sector cases, our thesis is that labor arbitrators deciding cases in the private sector should not recognize an employee's right to some fifth-amendment types of testimonial privilege. Rather, arbitrators should acknowledge an employee's obligation to truthfully provide management with information. Recognition of an employee's right to stand silent should be forthcoming only in those situations where the questions do not relate to the performance of the employee's official duties.

## II. TESTIMONIAL PRIVILEGES IN PUBLIC-SECTOR EMPLOYMENT

### A. Review of Case Law

In part, the fifth amendment to the United States Constitution states "no person shall . . . be compelled in any criminal case to be witness against himself."<sup>3</sup> This constitutional provision stems from an historical denouncement of the ecclesiastical inquisitions, which forced defendants to admit guilt or face "eternal damnation."<sup>4</sup> Based on this theory, the amendment was designed to provide protection from compelled testimony that would later be used to convict.<sup>5</sup> From these beginnings, however, the fifth amendment has traversed many areas of legal jurisprudence.

In *Malloy v. Hogan*,<sup>6</sup> the Supreme Court applied the provisions of the fifth amendment to the states through the due process clause of the fourteenth amendment. In *Malloy*, the Court recognized the incongruity of having

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type of arbitration as "compulsory arbitration" because the parties are compelled under the collective bargaining agreement to arbitrate the grievance and recognize the award as final and binding. See generally Hill & Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 WILLAMETTE L. REV. 463 (1991).

#### 3. The fifth amendment to the U.S. Constitution reads in full:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. v.

4. *Andresen v. Maryland*, 427 U.S. 463, 470-71 (1976).

5. *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-05 (1977).

6. 378 U.S. 1 (1964).

different standards determine the validity of a fifth-amendment privilege "based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court."<sup>7</sup> Accordingly, identical standards determine whether an individual's silence in either a federal or state proceeding is justified.

The language of the fifth amendment specifically limits the right against self-incrimination to cases concerning criminal charges. The amendment, however, has been applied liberally to cases where the issues merely touch criminal concerns. During the last twenty years, the progressive translation of the fifth amendment has been catapulted by the fourteenth amendment. One of the fifth amendment's most attenuated applications arose in the public employment law setting. The extension of the fourteenth amendment's protection to the public employee was confronted by the Supreme Court for the first time in *Garrity v. New Jersey*.<sup>8</sup> In *Garrity* a group of municipal police officers were the target of investigations of traffic ticket fixing by the New Jersey Attorney General's Office. At the beginning of interrogations, each officer was warned that "(1) anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office."<sup>9</sup> The officers

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7. *Id.* at 11.

8. 385 U.S. 493 (1967).

9. A New Jersey state statute provided the following:

Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall there by forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this state provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this state.

N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965) (quoted in *Garrity*, 385 U.S. at 494 n.1).  
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answered the questions even though they were not offered a grant of immunity. Over objections, some of the evidence revealed by the questions was later used in criminal proceedings for "conspiracy to obstruct the administration of the traffic laws."<sup>10</sup>

The officers' convictions were subsequently upheld in the face of claims that evidence obtained in the interrogations was "coerced."<sup>11</sup> The officers argued that if they had refused to answer, they would have lost their jobs.<sup>12</sup> Thus, one of the issues facing the Supreme Court was whether statements obtained under the fear of being discharged for the failure to answer questions were products of coercion.<sup>13</sup> As a preliminary concern, however, the Court was asked to define the perimeters of coercion.<sup>14</sup> Recognizing that coercion could be both mental and physical,<sup>15</sup> the Court stated, "the question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer."<sup>16</sup> Justice Douglas, writing for a 6-3 majority, pointed out that the choice given the employees was either to forfeit their jobs or to incriminate themselves, and "the option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."<sup>17</sup>

The Court found that the choice "between the rock and the whirlpool" constituted coercion and could not be sustained as voluntary under prior decisions.<sup>18</sup> Concluding that "policemen, like teachers and lawyers, are not required to a watered-down version of constitutional rights,"<sup>19</sup> the Court held that the fifth amendment protected the officers from having coerced statements used in a subsequent criminal prosecution.

Justice Harlan, in a forceful dissent, opposed the Court's apparent declaration that the "condition" placed on the officers to respond to the questions or lose their jobs made the statements "involuntary as a matter of fact."<sup>20</sup> Further, according to Harlan, the holding that the statements were "inadmissible as a matter of law on the premise that they were products of an

10. *Garrity*, 385 U.S. at 495.

11. *Id.* at 494-95.

12. *Id.*

13. *Id.* at 495.

14. *Id.*

15. *Chambers v. Florida*, 309 U.S. 227, 237 (1940).

16. *Garrity*, 385 U.S. at 496 (citing *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

17. *Id.* at 497.

18. *Id.* at 498.

19. *Id.* at 500.

20. *Id.* at 501-02 (Harlan, J., dissenting).

impermissible condition imposed on the constitutional privilege" is suspect.<sup>21</sup> Justice Harlan responded that "[t]he majority is apparently engaged in the delicate task of riding two unruly horses at once."<sup>22</sup>

Justice Harlan drew support for his contention from *Davis v. North Carolina*.<sup>23</sup> In *Davis*, the Court stated that voluntariness is determined by whether the accused's decision "was overborne by the sustained pressures upon him."<sup>24</sup> Justice Harlan went on to apply facts in *Garrity* that the majority ignored. Harlan noted that all of the statements made by petitioners were taken in a room in a fire station, and when the depositions were taken, none of the officers were in custody.<sup>25</sup> Further, Harlan pointed to the court reporter's testimony that no indications of "unwillingness" were apparent.<sup>26</sup> Under this evidence record, Harlan concluded that as a matter of fact, "there [was] no basis for saying that any of these statements were made involuntarily."<sup>27</sup> With respect to the question whether the statements were inadmissible because they were "involuntary as a matter of law," Harlan reasoned that this query involves the question of "whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible."<sup>28</sup> Taking the side of the employer, Harlan found that "nothing in logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged."<sup>29</sup> In Harlan's view, the majority's holding "extends the scope of the privilege beyond its essential purposes, and seriously hampers the protection of other important values."<sup>30</sup> The majority position precludes a sanction (discharge) "which presents, at least on its face, no hazard to the purpose of the constitutional privilege, and which may reasonably be expected to serve important public interests."<sup>31</sup> Unlike the majority, Harlan found no legal infirmity in dismissing a police officer who declines, on the grounds of privilege, to disclose information pertinent to his public responsibilities.<sup>32</sup>

21. *Id.* at 501.

22. *Id.*

23. 384 U.S. 737 (1966).

24. *Id.* at 739; *Garrity*, 385 U.S. at 505.

25. *Garrity*, 385 U.S. at 506 (Harlan J., dissenting).

26. *Id.*

27. *Id.* at 506.

28. *Id.* at 507.

29. *Id.*

30. *Id.* at 508.

31. *Id.*

32. In a footnote, Harlan pointed out that Judge Jerome Frank, in defense of the privilege, stated that it would be entirely permissible to discharge police officers who



In the emerging law of public employment, the *Garrity* decision raised as many issues as it purported to solve. Foremost of these was whether the right against self-incrimination, as recognized by *Garrity*, was limited to situations where the public official was not granted immunity. In 1968, however, the Supreme Court faced this exact issue in *Gardner v. Broderick*.<sup>33</sup>

In *Gardner*, a New York City police officer was discharged because he refused to "waive his privilege against self-incrimination."<sup>34</sup> The waiver was in connection with a New York County grand jury investigation of bribery and corruption in connection with unlawful gambling operations.<sup>35</sup> The police officer in *Gardner* was told that if he did not sign the waiver, he would be fired.<sup>36</sup>

The issue faced by the Court was whether a state may discipline or discharge an officer for refusing to waive his fifth amendment right.<sup>37</sup> The Court recognized that "[t]he privilege may be waived in appropriate circum-

decline to disclose relevant information. Harlan quoted Frank as follows:

Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim they had a constitutional right to refuse to answer under the circumstances, but . . . *they had no constitutional right to remain police officers* in the face of their clear violation of the duty imposed upon them.

*Id.* at 509 n.3 (quoting *United States v. Field*, 193 F.2d 106 (2d Cir. 1951) (court's emphasis)).

33. 392 U.S. 273 (1968).

34. *Id.* at 274.

35. *Id.*

36. *Id.* New York City Charter § 1123 provided that:

If any councilman or other officer or employee of the city shall, after lawful notice of process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

N.Y. CITY CHART. § 1123 (1966).

37. *Gardner*, 392 U.S. at 273.

stances if the waiver is knowingly and voluntarily made.<sup>38</sup> Further, the Court expounded the underlying theory of today's immunity doctrine by stating that "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."<sup>39</sup>

The Court compared the facts of *Gardner* to *Spevack v. Klein*.<sup>40</sup> In *Spevack*, the Court ruled that a lawyer could not be disciplined solely because he refused to testify at a disciplinary proceeding.<sup>41</sup> In an attempt to draw a distinction, however, the City of New York argued that "unlike the lawyer, [a police officer] is directly, immediately, and entirely responsible to the city or state which is his employer."<sup>42</sup> The City further argued that a police officer "owes his entire loyalty to [the city]" and he is "a trustee of the public interest."<sup>43</sup>

The Court in *Gardner* agreed with management and reasoned that if a policeman had

refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal.<sup>44</sup>

In *Gardner*, however, the issue was not whether the officer refused to answer questions. The employee was dismissed because he failed to waive his constitutional right.<sup>45</sup> Accordingly, the Court found that because the testimony demanded by the city was intended to be used in a criminal proceeding, a discharge for failure to waive his fifth amendment rights could not stand.<sup>46</sup>

On the same day that *Gardner* was handed down, a companion case was decided. In *Uniformed Sanitation Men Association v. Commissioner of Sanitation*,<sup>47</sup> a number of sanitation workers were dismissed from employment with the City of New York for refusing to testify in front of the

38. *Id.*

39. *Id.*

40. 385 U.S. 511 (1967).

41. *Id.* at 511-13.

42. *Id.* at 513-15.

43. *Id.*

44. *Gardner*, 392 U.S. at 278.

45. *Id.*

46. *Id.*

47. 392 U.S. 280 (1968).

Commissioner of Investigation of New York City.<sup>48</sup> Most of the workers refused to testify. A few of the workers, however, testified without immunity.<sup>49</sup> The Court's opinion paralleled that of *Gardner*. The Court stated that public-sector employees subject themselves to discharge if they refuse to account for their performance "after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."<sup>50</sup> The obvious implications of this statement was that "proper proceedings" related to the grant of criminal immunity.

*Garrity*, *Gardner*, and *Sanitation Men* constitute the foundation of the fifth-amendment right against self-incrimination for public employees. Under current law it is improper to compel an employee to waive his constitutional rights in a criminal proceeding by threat of dismissal. It is, however, proper for an agency to demand an accounting of a public employee's performance of his duties even though criminal activities may be involved. A refusal to give such an accounting may then be deemed to be insubordination. Thus, even though the municipality may not force the employee to waive his constitutional right against self-incrimination, it may grant the employee immunity and then dismiss for insubordination if no accounting is forthcoming.

## 1. The Granting of Immunity

As noted in *Gardner*, testimony may be compelled if immunity is granted from criminal prosecution. This central issue in the right against self-incrimination was faced four years after *Gardner* in *Kastigar v. United States*.<sup>51</sup> In *Kastigar* the issue was whether the federal government "can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring (on the witness) immunity . . . from use of the compelled testimony in subsequent criminal proceedings . . ."<sup>52</sup> The government had conferred immunity on the defendants under a provision of the Organized Crime Control Act of 1970, which essentially provided that neither the compelled testimony nor the information derived from the grant of immunity could be used in a subsequent criminal proceeding.<sup>53</sup> The *Kastigar* Court tempered the government's power

48. *Id.* at 280-81.

49. *Id.* at 281-82.

50. *Id.* at 282.

51. 406 U.S. 441, *reh'g denied*, 408 U.S. 931 (1972).

52. *Id.* at 442.

53. 18 U.S.C. § 6002 (1988) reads as follows:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before

to compel testimony. It first observed that an important power of the state to assure the effective functioning of government is to compel residents to testify in court or before grand juries.<sup>54</sup> The Court then noted that a number of exceptions from the testimonial duty exist.<sup>55</sup> The foremost is the fifth amendment's right against self-incrimination which, the Court notes, "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . ."<sup>56</sup> The Court, however, in light of prior decisions,<sup>57</sup> refused to find that immunity statutes were unconstitutional on their face.<sup>58</sup> Further, the Court stated that "while a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader."<sup>59</sup> The Court denied the defendant's argument that only transaction immunity<sup>60</sup> would pass constitutional muster.

*Lefkowitz v. Cunningham*<sup>61</sup> parallels this decision. In *Lefkowitz*, a New York election law prohibited a person from holding public office, if while holding an office, the person declined to waive his right to immunity from the use of his testimony.<sup>62</sup> The Court held that a witness may "refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case is

or ancillary to

- 1) a court or grand jury of the United States,
- 2) an agency of the United States, or
- 3) either House of the Congress, a joint committee of the two Houses, or a committee of subcommittee of either house,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

54. *Kastigar*, 406 U.S. at 442-43.

55. *Id.* at 444 (quoting *Blair v. United States*, 250 U.S. 273 (1919)).

56. *Id.*

57. *Ullmann v. United States*, 505 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896).

58. *Kastigar*, 406 U.S. at 451-52.

59. *Id.* at 453.

60. *Id.* Transactional immunity would provide immunity from all prosecution for the offense compelled to testify about.

61. 431 U.S. 801 (1977).

62. *Id.* at 803-04.

which he is a defendant."<sup>63</sup> The Court reiterated that the government cannot punish an employee's use of the fifth amendment by threatening discharge or other punishment unless the testimony has been immunized.<sup>64</sup> Once immunity is granted, however, the state may use its contempt powers to compel the testimony concerning the conduct of public employees in office, "without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources."<sup>65</sup>

Clearly immunity is constitutional. Further, a person may be held in civil or criminal contempt for failure to testify after immunity is granted. Once immunity is granted, being forced to testify is not the same as being forced to waive the right against self-incrimination. As the Court noted in *Kastigar*, immunity statutes have their historical roots in Anglo-American jurisprudence and are not incompatible with fifth-amendment values. Rather, immunity seeks "a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify."<sup>66</sup>

## 2. The Requirement of an Affirmative Grant of Immunity

An issue that has emerged after *Garrity* and *Gardner* is under what circumstances is the testimony of a public employee automatically immunized from use in later criminal proceedings. That is, can the state be precluded from using the statements given by an employee in an investigation when the employer and state's attorney do not explicitly declare that immunity is given? Further, if the testimony is coerced during the investigation and no immunity is given, must the employee cooperate in the investigation? The Supreme Court has yet to directly face the issue. Many lower courts, however, have considered the use of an employee's statement where no affirmative grant of immunity was given.

In *United States v. Devitt*,<sup>67</sup> the Seventh Circuit Court of Appeals stated that disciplinary action cannot be taken for refusing to testify "unless [the employee] is first advised that, consistent with the holding in *Garrity*, evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings."<sup>68</sup> Similarly, in *Confederation of Police v. Conlisk*,<sup>69</sup> the Seventh Circuit held that a public employer may dismiss an employee for refusing to answer questions "where the employer both asks

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63. *Id.* at 805.

64. *Id.* at 806.

65. *Id.* at 809.

66. *Kastigar*, 406 U.S. at 445-46 (footnote omitted).

67. 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

68. *Id.* at 137.

69. 489 F.2d 891 (7th Cir. 1974).

specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, i.e., that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.<sup>70</sup>

Likewise, in *D'Acquisto v. Washington*,<sup>71</sup> the United States District Court for the Northern District of Illinois addressed the issue of whether disciplinary action could be taken against a police officer who invokes his fifth-amendment right.<sup>72</sup> The court pointed out that immunity must be affirmatively granted.<sup>73</sup> In *D'Acquisto*, Chicago police officers were accused of criminal and internal offenses.<sup>74</sup> While being interrogated by police personnel, the officers refused to give information until they obtained assurance from the state's attorney that they would not be prosecuted.<sup>75</sup> The officers were suspended for "disobeying an order to speak and [for] failure to cooperate with an investigation."<sup>76</sup> In addressing the dismissal, the court noted that courts considering the question have held that no affirmative grant of immunity from prosecuting authority is necessary.<sup>77</sup> These courts reason that the privilege against self-incrimination affords a form of use-immunity that attaches automatically as a matter of law when a public employer compels incriminating statements. The logic runs as follows. The Supreme Court has held that the threat of being fired is sufficient to constitute compulsion of the statements. As a matter of law, compelled statements cannot be used against their maker in a criminal proceeding. Therefore, as a matter of law the statements cannot be used regardless of whether immunity has been granted expressly.<sup>78</sup> The *D'Acquisto* court rejected this logic in favor of an affirmative grant of immunity.<sup>79</sup>

However persuasive the logic, the Supreme Court's language in more than one opinion on employee statements speaks of an affirmative grant of use immunity.<sup>80</sup> The language of Seventh Circuit opinions also appears to

70. *Id.* at 893.

71. 640 F. Supp. 594 (N.D. Ill. 1986).

72. *Id.* at 594-95.

73. *Id.*

74. *Id.* at 595.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977) ("Once proper use immunity is granted . . ."); *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) ("[the employee] may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers [and] . . . states must offer to the witness

require that employees first be affirmatively advised that they will have use-immunity if they speak.

As both the Fifth Circuit and Judge Marshall of this district read this language, the cases mean that the employee must have an affirmative assurance of immunity before an employer can demand answers. They do not appear to require specifically a communication from the prosecutor. The employer, it would seem, can do the advising. Officers under interrogation, however, are not expected to know the ins and outs of fifth amendment law, and they should not have to guess whether they have criminal immunity for their statements.

Other circuits have faced the issue as well.<sup>81</sup> As pointed out in *D'Acquisto*, the Fifth Circuit has indirectly adopted the Seventh Circuit's holding. It has been able, however, to skirt the issue directly. In *Gulden v. McCorkle*,<sup>82</sup> two employees (Gulden and Sage) of the Dallas Public Works Department were discharged because they refused to submit to a polygraph exam. The plaintiffs argued that the city had failed to "tender them immunity in regard to use of their polygraph answers in subsequent criminal proceedings."<sup>83</sup> The city contended that at all times during the polygraph testing, the plaintiffs' right against self-incrimination was present. Therefore, according to the city, an active grant of immunity was not required.

Plaintiff-employees Gulden and Sage did not claim that the city explicitly requested that they waive immunity. The court noted that plaintiffs claimed that case law "mandate[d] that once they articulated their fifth amendment concerns, the Defendants were required to make an affirmative tender of immunity before a polygraph exam could be required."<sup>84</sup> The court found no support for this theory. According to the Fifth Circuit, the employees were not entitled to an affirmative tender of immunity before they could be required to submit to a polygraph exam for the purpose of inquiring about a bomb threat received by their employer. The court reasoned that because "the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed . . . it was sufficient that the employees were told that they must take the polygraph exam to retain employment."<sup>85</sup>

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whatever immunity is required . . .").

81. The Second Circuit has stated that "the employee is [to be] duly advised of his options and the consequences of his choice." *Uniformed Sanitation Men Ass'n, Inc. v. Commission of Sanitation of New York*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

82. 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

83. *Id.* at 1071.

84. *Id.* at 1074.

85. *Id.* at 1076.

While the law is unsettled in this area, clearly if statements are compelled without any corresponding grant of immunity, the employee can claim that those statements are barred from use in subsequent criminal proceedings. Without a grant of immunity, however, the courts hold that an employee need not cooperate. Thus, management will never obtain an accounting and the employee cannot be dismissed for not cooperating.

### 3. *Blunier v. Board of Fire & Police Commissioners*.<sup>86</sup> The Law Applied

A 1989 decision from the Appellate Court of Illinois illustrates the complexities involved when employees are asked for an accounting. The procedural history is somewhat complex. Firefighters Ochs and Blunier were charged before the Peoria Fire and Police Commission with raping a 17-year-old woman while on duty and with insubordination for refusing to answer questions about the incident in the course of an internal investigation.<sup>87</sup> The Commission found them guilty on all charges and discharged them from the Department.<sup>88</sup> The circuit court reversed the Commission on the rape charge, affirmed the Commission on the charges of insubordination, but reversed on the penalty of discharge, and remanded for the imposition of a lesser penalty.<sup>89</sup> After first refusing to comply with the circuit court's order, and after further court proceedings, the Commission imposed a 30-day suspension for the charge of insubordination, but ruled that neither firefighter could return to work until the appellate process had run its course.<sup>90</sup> The appellate court held that there was insufficient evidence to support the Board's decision that the firemen had engaged in sexual relations with a woman without her consent.<sup>91</sup>

What is interesting is the court's discussion of use-immunity and the firefighters' refusal to answer any questions having to do with the time period of midnight to 8:00 a.m. on July 13, 1986 (the shift where the alleged sexual assault took place). The interrogation was conducted by an investigator hired by the Department for the purpose of investigating the events that allegedly transpired on July 13.<sup>92</sup> Prior to the questioning, the investigator advised each firefighter of his rights under the Fireman's Disciplinary Act;<sup>93</sup> the

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86. 90 Ill. App. 3d 92, 545 N.E.2d 1363 (1989).

87. *Id.* at 93, 545 N.E.2d at 1363-64.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 95, 545 N.E.2d at 1366.

92. *Id.* at 93-94, 545 N.E.2d at 1364.

93. *Id.* at 94, 545 N.E.2d at 1364. The Fireman's Disciplinary Act is found in ILL.



acting Fire Marshall "ordered each to answer every question truthfully, correctly, accurately and unequivocally."<sup>94</sup> Regarding the investigator's first question about the time period of midnight to 8:00 a.m., the firefighters' counsel objected and advised that his clients were invoking their constitutional rights under the fifth amendment and would answer no questions regarding that time frame. The acting Fire Marshall again ordered the firefighters to answer the question or face disciplinary action.<sup>95</sup> The Board's counsel stated for the record "that each fireman had refused to answer despite a direct order to do so and under threat of disciplinary action which would be an exception to . . . [the] right to claim the Fifth Amendment as the statement from here on out would be inadmissible in court . . . ."<sup>96</sup>

Two questions were presented for appeal: 1) whether an employer's attorney's admonishment that use immunity has attached is sufficient, and 2) whether the firefighters were adequately informed of the use immunity doctrine during the interrogation.<sup>97</sup> On the first issue the court made it clear that "no affirmative assurance of immunity from the prosecuting attorney is required. . . . 'The employer, it would seem, can do the advising.'"<sup>98</sup> It was sufficient, reasoned the court, that the grant came from the Board's counsel.

With respect to the second question, the court found that until the employer advises the employee of use immunity, it cannot rightfully impose discipline for failing to answer questions pursuant to the employee's fifth-amendment rights.<sup>99</sup> Where questions were asked and answered *prior* to plaintiffs invoking their fifth-amendment privileges, and then immunity granted, from that point on the employer had satisfied the use immunity requirement. Thus the firefighters' subsequent refusal to answer valid inquiries regarding their on-duty activities subjected them to disciplinary action, in this case dismissal.<sup>100</sup>

### B. Summary and Analysis

The Supreme Court has made it clear that the privilege against self-incrimination is related to the question of what safeguards are necessary to assure that admissions or confessions are relatively trustworthy—that they are not the product or fruits of fear or coercion, but are reliable expressions of the

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REV. STAT. ch. 85, para. 2501 (1987).

94. *Blunier*, 90 Ill. App. 3d at 97, 545 N.E.2d at 1369-70.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (quoting *D'Acquisto v. Washington*, 640 F. Supp. 594 (N.D. Ill. 1986)).

99. *Id.*

100. *Id.*

truth. The privilege also reflects the limits of the individual's atonement to the state, and in a philosophical sense, insists upon the equality of the individual and the state.<sup>101</sup>

In 1966, in *Miranda v. Arizona*,<sup>102</sup> the Supreme Court declared that the fifth amendment's privilege against self-incrimination "is available outside of the criminal court proceedings and serves as evidence to protect persons in all settings in which their freedom of action is curtailed in any significant way . . . ." <sup>103</sup> Prior to *Miranda*, the standard inquiry for the admissibility of confessions was whether the confession was "voluntary," given the totality of the circumstances. In *Miranda*, the Court rejected a case-by-case inquiry into the voluntariness of an individual's admissions, and instead, created a blanket presumption that statements obtained from a suspect during custodial interrogation were compelled, thus requiring their exclusion from evidence.<sup>104</sup> What resulted was the famous *Miranda* warnings requiring that when a person is taken into custody, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed."<sup>105</sup> The Court also held in *Miranda* that a defendant may waive the right to counsel and to remain silent provided that the waiver is made voluntarily, knowingly, and intelligently.<sup>106</sup>

The law governing the extent to which a governmental entity may force its employees to answer questions in the course of an investigation strikes a balance between the employee's privilege against self-incrimination and the state's interest in getting an accounting from someone who holds a public trust. This balance, correctly or incorrectly, has resulted in the following matrix:

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101. *In re Gault*, 387 U.S. 1, 47-48 (1967) (citing *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 94 (1964)).

102. 384 U.S. 436 (1966).

103. *Id.* at 467.

104. *Id.*

105. *Id.* at 444. Under the Burger Court the *Miranda* doctrine had been limited significantly. *See, e.g., New York v. Quarles*, 467 U.S. 649 (1984) (public safety exception); *Oregon v. Hass*, 420 U.S. 714 (1975) (allowing improperly elicited statements to be used for impeachment at trial); *Harris v. New York*, 401 U.S. 222 (1971).

106. *Miranda*, 384 U.S. at 444.

### 1. What is the State Prohibited from Doing?

A public employer may not fire an employee solely because he is unwilling to abandon his privilege against self-incrimination.<sup>107</sup> Nor may an employer use the threat of dismissal to coerce statements from an employee and then use the statements in a criminal proceeding.<sup>108</sup> In such a circumstance coercion is presumed, and the state bears the burden of showing voluntariness of the statement.<sup>109</sup> As a result, the public-sector employer has three options: (1) public management can demand an accounting from the employee on job-related matters but then cannot use these statements in a criminal prosecution (given, of course, that the employee elects to talk); (2) the public employer can simply prosecute the employee, in which case an accounting need not ever be forthcoming; and (3) management can demand an accounting, grant immunity, and thereby preclude the state's attorney from prosecuting based on any information supplied by the employee.<sup>110</sup> The public employer cannot use any coerced statements in a criminal proceeding against the employee.<sup>111</sup> What is settled is that, absent immunity, the privilege against self-incrimination permits a person not to answer official questions put forth to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in a future criminal proceeding. Therefore, as *Blunier* demonstrates, the better rule is that until the employee has an affirmative assurance of immunity (i.e., when the employer or the state's attorney says the words "you have immunity"), the employee need not answer possible incriminating questions. Once immunity attaches, either because it is affirmatively granted by an employer or the state's

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107. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Gardner v. Broderick*, 392 U.S. 273 (1968).

108. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *People v. Bynum*, 159 Ill. App. 3d 713, 512 N.E.2d 826 (1987).

109. *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985).

110. *Cunningham*, 431 U.S. at 809.

111. *Blunier v. Board of Fire & Police Comm'rs of Peoria*, 190 Ill. App. 3d 92, 545 N.E.2d 1363 (1989). The *Garrity* court outlined with specificity the standards courts have used in determining whether the accused's statements are voluntary or coerced. According to *Garrity*: "the criteria employed have included threats of imminent danger . . . physical deprivations . . . repeated or extended interrogation . . . limits on access to counsel or friends . . . length and illegality of detention under state law . . . individual weakness or incapacity . . . [and] adequacy of warnings of constitutional rights . . ." *Garrity*, 383 U.S. at 505 (citations omitted). The Court made it clear that "[w]hatever the criteria employed, the duty of the Court has been 'to examine the entire record,' and thereby to determine whether the accused's will 'was overborne by the sustained pressures upon him.'" *Id.* at 505-06 (quoting *Davis v. North Carolina*, 384 U.S. 737, 741 (1966)).

attorney, or because the statements were "coerced," the employee must answer or face the loss of his job.

## 2. Who Must Give an Affirmative Assurance of Immunity?

The question of who is the proper person to give the employee immunity or who has the authority to grant immunity in a particular government department has not been definitively answered by the courts. Amazingly, in *Blunier* the appellate court found that the Commission's counsel was able to grant immunity.<sup>112</sup> Equally bizarre, the *Blunier* court also stated that no affirmative assurance from the prosecutor is necessary and that the employer can give immunity.<sup>113</sup> The rationale is that use-immunity attaches as a matter of law so that the employer's grant of immunity to the employee is sufficient.<sup>114</sup>

While it is not clear from the cases what "authority" is necessary to grant immunity, public policy dictates that, at a minimum, if the courts allow someone other than the state's attorney to grant immunity, it should be given only by a supervising or chief official who is not part of the bargaining unit.<sup>115</sup> Therefore, if an employee is informed by a "non-manager" or person who lacked the authority to give immunity, the employee's statements can be used against him unless it can be demonstrated they were obtained under false pretense.

## 3. What Can Management Do?

As noted, the public employer may ask questions specifically, directly, and narrowly relating to the performance of the employee's official duties, even though the answers may tend to incriminate the employee (although management cannot use those incriminating statements in a subsequent criminal proceeding, unless they are voluntarily given by the employee). Public management has an interest in getting an accounting from its employees. Constitutionally, the employee may be terminated on the basis of the answer or for refusing to answer. Refusing to answer questions, after

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112. *Blunier*, 190 Ill. App. 3d at 95, 545 N.E.2d at 1366.

113. *Id.*

114. See *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985) (department chief and major informed the employee that statements would not be used for criminal prosecution); *D'Acquisto v. Washington*, 640 F. Supp. 594 (N.D. Ill. 1986) (state's attorney for Cook County gave use immunity).

115. We can think of no good reason why the state's attorney should be precluded from prosecuting because a lower-level, bargaining-unit supervisor in another branch of government decided to grant immunity.

being directly ordered to do so and after being advised of use-immunity, is a serious breach of duty that should not be tolerated by management. A government agency should not have to rely on the investigation of some outside authority when the agency's credibility and accountability to the public is at stake.<sup>116</sup>

No case holds that a public employee has an absolute right to keep silent. The Constitution does not force the state to employ anyone who is accused of a criminal act and elects to keep quiet. Due process and fairness require only an opportunity to be heard. If an individual chooses not to take advantage of that opportunity, due process has been satisfied. The employee simply must make the choice between his opportunity to be heard and the privilege against self-incrimination.

Additionally, when the employee is given use immunity, even though his statements may not be used in a future criminal proceeding against him, the state is not prohibited from prosecuting the witness on the basis of evidence derived from other sources.<sup>117</sup> Further, the state is never prohibited from using voluntary statements made by the employee. If public management asks the employee a question and the employee freely and voluntarily answers, the statements can be used in a criminal prosecution unless the employee demonstrates that the statements were coerced.

#### 4. Suggested Format

Some state agencies have adopted a *Miranda*-type approach to the problem, outlining with specificity the law in the area and the employee's rights. Following the suggested format should eliminate any subsequent legal challenges based on fifth-amendment concerns when an employee is asked to participate in an investigation. A representative form with relevant declarations is as follows:

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Administrative Advisement		
Location Advisement Given:	Date	Time

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1. I wish to advise you that you are being questioned as part of an official investigation of the \_\_\_\_\_ Police (Fire) Department.

2. You will be asked questions specifically directed and narrowly related to the performance of your official duties and responsibilities or fitness for office.

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116. *Blunier*, 190 Ill. App. 3d at 100, 545 N.E.2d at 1372.

117. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

3. You are entitled to all the rights and privileges guaranteed by the laws and the constitution of the State of \_\_\_\_\_ and the Constitution of the United States, including the right not to be compelled to incriminate yourself.

4. I further wish to advise you that if you refuse to testify or refuse to answer questions relating to the performance of your official duties and responsibilities or fitness for duty, you will be subject to departmental charges, which could result in dismissal from employment with the City of \_\_\_\_\_ Police (Fire) Department.

5. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. These statements, however, may be used against you in relation to subsequent departmental charges.

The form should also contain a signed declaration acknowledging that the administrative advisement has been given, the signatures (if applicable) of the employee's bargaining representative and the person giving the administrative advisement. It should also be witnessed and dated by all present.<sup>118</sup>

### III. ARBITRAL RULINGS

To what extent do arbitrators recognize constitutional privileges both in the public and private sector? More important, has the *Garrity*, *Gardner*, and *Lefkowitz* line of reasoning spilled over to public-sector grievance arbitration? Suppose an employee refuses to answer questions or otherwise cooperate in an investigation that is clearly unreasonable? What is the remedy for an employee who refuses to cooperate rather than obey management's directives and files a grievance at a later time? From a policy perspective, what considerations should arbitrators take into account when deciding duty-to-cooperate cases? Does it matter whether the arbitrator is hearing a case in the public as opposed to the private sector?

#### A. *Asserting Constitutional Arguments in Labor Arbitration*<sup>119</sup>

In 1967, Robben Fleming observed that in the arbitral setting the constitutional protection against self-incrimination has little application except

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118. We are thankful to Steven Rynecki, Esq., of von Briesen and Purtell, Milwaukee, Wisconsin, for making available his file and forms on this matter.

119. This section is taken in part from M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION 229-72* (1987).

insofar as it may be a desirable principle in the interest of fair procedure.<sup>120</sup> Similarly, Willard Wirtz has argued that the privilege against self-incrimination enters into due process of arbitration, but its relevance is a very special one. According to Wirtz, there is a clear consensus in the arbitral opinions that this privilege has no place in the arbitration of grievance cases. Wirtz asserts that "due process of arbitration" is a distinct concept, similar in its approach and purposes to "due process of law," but entirely independent in the conclusion it reaches.<sup>121</sup>

In *Illinois Power Co. v. United Association of Journeymen Plumbers Local 360*,<sup>122</sup> a company sought information regarding the grievant's conduct during work hours while on assignment. The case provided opportunity for another arbitrator to reason that while the Constitution protects an accused in criminal proceedings, it does not guarantee that an employee who invokes the fifth amendment during the investigation of infractions of company rules and policies will continue to be employed.<sup>123</sup> Addressing the issue of an employee's duty to cooperate, the arbitrator declared that it would be an act of insubordination subject to discipline or even discharge for an employee to "refuse to meet with an employer or to cooperate with the employer regarding legitimate work-related conduct."<sup>124</sup> The arbitrator pointed out that in the instant case, management sought information regarding the employee's conduct during working hours on company assignment. The arbitrator correctly recognized that "[w]hile the Constitution protects an accused in criminal proceedings, it does not guarantee that an employee who invokes the Fifth Amendment during the investigation of infractions of Company rules and policies will continue to be employed."<sup>125</sup>

Probably the best summary of the application of the fifth amendment to the employer-employee relationship is given by Arbitrator John McGury in *Simoniz Company*.<sup>126</sup> The grievant was dismissed for failure to cooperate with the employer in a theft investigation. On advice of counsel, the grievant

120. R. FLEMING, *THE LABOR ARBITRATION PROCESS* 182 (1965). Larry Schultz, former FMCS Director of Arbitration Services has remarked: "If an arbitrator is faced with somebody pleading the Fifth, remind them that arbitration is not a criminal proceeding." L. Schultz, *Procedural Rulings During the Hearing*, in *ARBITRATION 1982: CONDUCT OF THE HEARING; PROCEEDINGS OF THE 35TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 144-45 (1983).

121. Wirtz, *Due Process in Arbitration, The Arbitrator and the Parties*, in *PROCEEDINGS OF THE 11TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 19 (1958).

122. 84 Lab. Arb. (BNA) 586 (1985) (Penfield, Arb.).

123. *Id.* at 588-89.

124. *Id.* at 589.

125. *Id.* at 590.

126. 44 Lab. Arb. (BNA) 658 (1964) (McGury, Arb.).

refused to sign any statements, even a statement denying any guilt or denying any knowledge of the theft. When the grievant was called as a witness at the trial of an individual who had been indicted in connection with the thefts, he took the fifth.

In sustaining the discharge the arbitrator stated that taking the fifth is a proper and legitimate tactic in criminal courts, "but the company is not required to pretend that this did not happen and refuse to draw any inferences from it."<sup>127</sup> The arbitrator's reasoning is especially instructive and represents the better view:

We cannot say, in addition to the guarantee, that the person invoking the Fifth Amendment has a right to this advantage in a criminal proceeding, and also has a right to be completely free from any financial, social, or other possible loss which he may suffer, indirectly, as a result of exercising his constitutional right . . . . Employers properly have a higher criteria of employee qualifications than mere freedom from a criminal conviction. Employers have a right to absolute honesty, as well as a reasonable amount of cooperation, from their employees.

The Fifth Amendment does not guarantee that a person who invokes it will not be subject to any unfavorable inference and does not guarantee that a person who invokes it shall be continued in employment.<sup>128</sup>

Finding just cause for dismissal, the arbitrator concluded that the grievant "took a position which went beyond the need of his own security and unreasonably infringed upon the right of the Company to make a thorough investigation of the incident, to the substantial disadvantage of the Company."<sup>129</sup>

While it is true that the strict self-incrimination protection offered by the fifth amendment is not applicable in the absence of government action, it is nevertheless clear that issues of self-incrimination are often present in labor arbitration.<sup>130</sup> The reported decisions indicate that arbitrators have been sensitive to constitutional-type concerns in ruling on the effect to be given the

127. *Id.* at 662.

128. *Id.* at 663.

129. *Id.*

130. An especially bizarre case is *Delaware River Port Auth. v. Independent Bridge Workers*, 76 Lab. Arb. (BNA) 350 (1981) (Raffaele, Arb.), where a husband and wife, as testifying witnesses for management, both "took the fifth" and refused to answer questions involving the provocation of a discharged employee. *See also Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1985) (rejecting argument that Amtrak, a "mixed ownership government corporation," was required to provide fifth amendment due process protection to a dismissed employee).



confession or admissions against interest by the grievant.<sup>131</sup> This is especially true in federal-sector arbitration.<sup>132</sup> Arbitrators may not declare that they are applying constitutional standards, but a close reading of their decisions indicates a constitutional-type analysis. Some examples are instructive.

In *Safeway Stores, Inc.*,<sup>133</sup> Arbitrator Arthur Jacobs refused to credit a grievant's signed confession (the confession was obtained during a company interrogation by security personnel who took turns questioning the grievant in a small room).<sup>134</sup> Arbitrator Jacobs recognized that constitutional safeguards are designed primarily as a protection against governmental action. Still, the arbitrator pointed out that "it does not follow that this rationale can be used to deprive the individual of his constitutional safeguards in all cases."<sup>135</sup>

131. See also ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 332-33 (4th ed. 1985); O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 314-18 (2d ed. 1983); R. FLEMING, *supra* note 120, at 181-86. See generally *Indiana Bell Tel. Co. v. Communication Workers Local 5709*, 83 Lab. Arb. Awards (CCH) para. 8585 at 5573 (1983) (Render, Arb.) (giving effect to grievant's written "confession" and stating that "[g]rievant's signature [on a written statement] was a concession that he took items from the store without paying."); *Safeway Stores, Inc. v. International Bhd. of Teamsters Local 690*, 82 Lab. Arb. Awards (CCH) para. 8506 at 5262 (1982) (McGury, Arb.) (crediting grievant's confession made to a polygraph examiner after failing a polygraph test, noting that "[t]he use of polygraphs for the purpose of promoting confessions has been found acceptable."); *Safeway Stores, Inc. v. International Ass'n of Machinists Lodge 2182*, 55 Lab. Arb. (BNA) 1195 (1971) (Jacobs, Arb.) (confession not credited when evidence of mental duress demonstrated); *Thrifty Drug Stores Co., Inc. v. Warehouse, Processing and Distribution Local 26*, 50 Lab. Arb. (BNA) 1253 (1968) (Jones, Arb.) (statements elicited regarded with "skepticism" and given weight only when other corroborating evidence present in situations where interrogations occur without presence of union representation and discipline likely); *Armco Steel Corp. v. United Steelworkers of Am. Local 2708*, 48 Lab. Arb. (BNA) 132 (1967) (Jones, Arb.) (discharge reversed where confessions unreliable); *Eastern Airlines, Inc. v. Air Line Pilots Ass'n*, 46 Lab. Arb. (BNA) 549 (1965) (Seidenberg, Arb.) (confession not invalidated absent duress and coercion; no infirmity found where grievant freely admitted use of alcohol to employer representative who secured grievant's confession and resignation); *Kroger Co. v. Amalgamated Meat Cutters Local 347*, 12 Lab. Arb. (BNA) 1065 (1949) (Blair, Arb.) ("confessions" given to private detective not credited where inducements, commitments, and threats were made by investigators).

132. See, e.g., *United States Dep't of the Treasury v. National Treasury Employees Union Local 183*, 82 Lab. Arb. (BNA) 1209, 1214 (1984) (Kaplan, Arb.) ("[t]he rule of law in the federal sector is clear: arbitrators must consider external law, and the U.S. Constitution is the supreme law.")

133. 55 Lab. Arb. (BNA) 1195 (1971) (Jacobs, Arb.).

134. *Id.* at 1196.

135. *Id.* at 1201.

According to Jacobs, constitutional protections against self-incrimination are broad and "related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy and are not the result of fear or coercion; that they are reliable expressions of the truth."<sup>136</sup>

In *Thrifty Drug Stores Co.*,<sup>137</sup> Arbitrator Edgar Jones, Jr., applying a constitutional-type analysis, stated that a trier of fact should proceed with caution when confessions are introduced.<sup>138</sup> He noted that a consideration must be "whether the statements are so tainted by compulsions created by the manner of their taking as to make it too speculative for a trier of fact . . . to give them credence as evidence against those whom they would implicate."<sup>139</sup> The case involved the theft of company merchandise. An employee confessed to his own wrongdoing and further implicated two other employees. The union, citing *Miranda*, argued that incriminating statements made by some of the discharged employees, which were used by the company to implicate the grievants, ought to be ruled inadmissible, or in any event be given no weight. Jones pointed out that the "*Miranda* decision is but one in a series of Supreme Court affirmations of a fundamental American public policy that seeks to develop . . . 'adequate protective devices . . . to dispel the compulsion inherent in custodial surroundings' so that any incriminating statements obtained 'can truly be the product of free choice.'<sup>140</sup> He then noted that while the industrial setting is different from the legal setting, important parallels exist. According to Jones, the arbitrator must determine whether there was truth-telling despite the custodial interrogation. Jones pointed out that procedures "that impose pressures on interrogated persons to disclose incriminating facts are unreliable as elicitors of truth and that their unreliability mounts in direct proportion to the increase in the pressures."<sup>141</sup>

Similarly, Arbitrator Whitley McCoy justified a refusal by an employee to cooperate with an investigation because it constituted an attempt by the employer to shift the burden of proof.<sup>142</sup> Citing fifth-amendment concerns, the arbitrator reasoned that there was no principle, or decided case upholding management's right to compel an employee, under pain of discharge, to admit or deny a rule violation or other offense.<sup>143</sup> In McCoy's view, such a principle would contradict Anglo-American principles, "particularly the one

136. *Id.*

137. 50 Lab. Arb. (BNA) 1253 (1968) (Jones, Arb.).

138. *Id.* at 1253-54.

139. *Id.* at 1262.

140. *Id.* at 1260-61 (citing *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)).

141. *Id.* at 1261.

142. *Exact Weight Scale Co. v. United Automobile Local 969*, 50 Lab. Arb. (BNA) 8, 8-9 (1967) (McCoy, Arb.).

143. *Id.*

that a man is presumed innocent until he is proven guilty, and that the burden of proof is on the one alleging an offense."<sup>144</sup>

Arbitrators have, with good cause, demonstrated caution before crediting a grievant's confession, even when taped.<sup>145</sup> Some courts, however, have sent a message to arbitrators that they should not summarily exclude incriminating admissions of grievants in considering dismissals under a just-cause provision. In *Young Radiator Co. v. UAW Local 37*,<sup>146</sup> the Seventh Circuit considered the dismissal of an employee for a December 15, 1979 theft of more than \$33,000 of silver solder which was used by the company in its manufacturing process.<sup>147</sup> After the theft was discovered the grievant was interrogated by the county sheriff's office.<sup>148</sup> During that interrogation the grievant refused to submit to a polygraph examination, but asked if he could speak "off the record." He then stated that he did not want to take a polygraph because he had taken a small quantity of silver solder from the company in the past, and that he was afraid that this would "show up" in a polygraph.<sup>149</sup> The police interrogator later related the grievant's remarks to a company executive.<sup>150</sup>

The arbitrator found that the company had not proven that the grievant was responsible for the later theft,<sup>151</sup> and accordingly, this could not be the basis for the dismissal. The arbitrator also found that the grievant's admission concerning his earlier taking of silver solder did not constitute just cause. He reasoned that this was not the "motivating cause" for the discharge. The lower court upheld the award and the court of appeals reversed.<sup>152</sup>

In holding for the company, the Seventh Circuit pointed out that the parties' agreement gave the employer the right to discharge an employee for theft. In the words of the court,

144. *Id.*

145. *Associated Grocers of Colo., Inc. v. International Bhd. of Teamsters Local 435*, 81 Lab. Arb. (BNA) 974 (1983) (Smith, Arb.) (reversing discharge of employee who had made taped admission to undercover agent that he had smoked marijuana, concluding that admissions were "put on").

146. 734 F.2d 321 (7th Cir. 1984).

147. *Id.* at 321-22.

148. *Id.* at 322.

149. *Id.*

150. *Id.* at 321-22.

151. *Id.* at 322 n.2.

152. The award was remanded to the arbitrator in order to determine whether "[the grievant's] statement that in the past he had taken a small quantity of silver solder from the company was sufficient evidence of theft to justify the discharge." *Id.*

at 325.

[n]othing in the collective bargaining agreement indicates that such a discharge should be permitted only if an earlier theft is the motivating cause for the discharge; this notion was introduced by the arbitrator himself. In so doing the arbitrator failed to confine himself to the terms of the collective bargaining agreement.<sup>153</sup>

Likewise, in *Postal Workers Union v. United States Postal Service*,<sup>154</sup> an arbitrator held that questioning of a grievant by postal inspectors for one and one-quarter hours before reading him his *Miranda* rights violated his privilege against self-incrimination and rendered his subsequent statement (made after *Miranda* warnings were issued) inadmissible at the arbitration hearing.<sup>155</sup> Because the grievant's statements formed the basis of the Postal Service's charges, the removal action was not sustained. On appeal, a federal court reversed the award.<sup>156</sup> According to the court, the issue was "whether the failure of the warnings under *Miranda* to [grievant] prior to making such a statement of admission renders such a statement inadmissible as a requirement in any provision of the collective bargaining agreement."<sup>157</sup> Finding that there was no *Miranda* requirement contemplated in the labor agreement, the court concluded that the award did not "draw its essence" from the collective bargaining agreement and that "the arbitrator exceeded his authority by implementing the requirements of *Miranda* in his arbitration award."<sup>158</sup>

A recurring issue is whether in the public sector an employee has any rights under the fifth amendment vis-a-vis his employer. Illustrative is *Hamilton v. Waukesha County Area Vocational, Technical and Adult Education District*<sup>159</sup> where plaintiff-teachers argued that their constitutional

153. *Id.* at 324.

154. 118 L.R.R.M. (BNA) 2472 (D.D.C. 1985), *rev'd*, 789 F.2d 1, 122 L.R.R.M. (BNA) 2094 (D.C. Cir. 1986).

155. In the words of the arbitrator:

I consider the following factors significant in any determination dealing with the questioning of this Grievant. He was an acknowledged suspect. He was questioned for at least one and one-quarter hours before his rights were explained. The testimony covering that time frame is sketchy at best. The Grievant was isolated from all outside contact. Coupled with the evidence and this environment, I find that the questioning for one and one-quarter hours before reading the Grievant his *Miranda* rights in effect undermined the Grievant's privilege against self-incrimination and was 'custodial interrogation.'

*Postal Workers*, 118 L.R.R.M. at 2473.

156. *Postal Workers*, 789 F.2d at 1.

157. *Id.* at 2473.

158. *Id.* at 2474.

159. 118 L.R.R.M. (BNA) 3197 (E.D. Wis. 1985).

rights were violated because incriminating statements taken by the police in an investigation were used against them in a dismissal hearing. In the case plaintiffs, both public and private-sector employees, were apprehended and subsequently discharged for having used marijuana at the workplace. The federal court rejected the argument that "a corollary to the exclusionary rule applied in criminal cases operates with identical effect in the context of public employment."<sup>160</sup> Instead the court drew a distinction between the liberty interest at stake in the criminal context and the property interest at stake in a public employment context. The *Miranda* safeguard, said the court, "operates as a procedural device to protect a criminal suspect's right against compulsory self-incrimination," while the dismissal of these employees simply implicates a property interest: "[t]he omission of *Miranda* warnings does not implicate their liberty interests, because no one is trying to put them in jail."<sup>161</sup> The court found no infirmity in using the employees' statements:

With reference to specific procedural safeguards claimed here, a reading of *Miranda* . . . discloses that the primary purposes of the requirement of *Miranda* warnings are to ensure that the Fifth Amendment privilege against self-incrimination is preserved, and to ensure that a suspect is aware of his Sixth Amendment right to counsel. Can an incriminating statement taken from a public employee who is not first advised of these rights be the basis for a discharge? The answer is "yes." To answer otherwise would revolutionize relations between public employers and their employees.<sup>162</sup>

In *Chisolm v. United States Postal Service*,<sup>163</sup> an employee was fired from his position for removing property without authorization.<sup>164</sup> The appellant-employee contended that the postal inspectors never advised him during custodial interrogation that his oral statements could be used against him; therefore, his constitutional right to counsel at the time of the interview was violated under the Court's *Miranda* holding.<sup>165</sup> The employee accordingly requested that the Memoranda of Interview generated by the inspectors be excluded.<sup>166</sup> The Merit System Protection Board ("MSPB") pointed out that the presiding official found that while a motion to suppress evidence can properly be made in a criminal proceeding, it is inapplicable to a removal action before the MSPB.<sup>167</sup> The officer ruled that the Sixth Amendment

160. *Id.* at 3199.

161. *Id.* at 3201.

162. *Id.*

163. 7 M.S.P.B. 42 (1981).

164. *Id.* at 43.

165. *Id.*

166. *Id.*

167. *Id.*

requirement of warning of the right to counsel has not been extended in all instances of governmental questioning, but only to those that have become criminal in nature. The MSPB stated that because it was not finding a violation of *Miranda*, it would not decide whether evidence obtained in violation of *Miranda* must be excluded in Board proceedings. The Board did note, however, that "an employee does not have a *Miranda* right to counsel in an agency investigative interview unless (1) the investigation may result in criminal prosecution; and (2) the interrogation takes place while the employee is in custody."<sup>168</sup>

In *Charter Township of Canton*,<sup>169</sup> an employer chose to rely only on a police investigation in establishing just cause. Arbitrator William Daniel held that a municipal employer had no basis for suspending or terminating an employee suspected of theft once it became apparent that criminal charges against the employee were going to be dropped because the grievant was not informed of his *Miranda* rights when giving a confession to police. The arbitrator reasoned that having "chosen to establish the police department as its agent for the purpose of investigating and collecting the facts pertinent to this grievant, it [management] may not accept the benefits without the obligations and limitations which are established by law."<sup>170</sup>

### B. Federal-Sector Notices to Admit

At the federal level "notices to admit" are sometimes issued by agencies in investigations of employee wrongdoing. Essentially, these notices require that the grievant supply the agency with information relating to the grievance. Arbitrator David Kaplan in *United States Department of Treasury*<sup>171</sup> ruled

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168. *Id.* See also *Long v. Veterans Admin.*, 10 M.S.P.B. 772 (1982) (sustaining removal of housekeeping aide for bringing handgun with loaded clip into VA Medical Center against claim that employee should have been read *Miranda* rights before being asked whether he owned jacket where handgun was found; at time VA police asked grievant if coat belonged to him, appellant was not in the custody of police, and once appellant responded that coat belonged to him, he was advised of his *Miranda* rights); *Book v. United States Postal Serv.*, 6 M.S.P.B. 322 (1981), *aff'd*, 675 F.2d 158 (8th Cir. 1982) (concluding that the fifth amendment does not preclude official from drawing adverse inferences when employee refuses to testify at administrative hearing in response to probative evidence offered against him or her); *Wilkens v. Veterans Admin.*, 6 M.S.P.B. 611 (1981) (rejecting argument that agency violated *Miranda* rights of employee during investigation where individual taking statement of employee was agency investigator with no authority to take employee under custody or arrest him).

169. 81 Lab. Arb. Awards (CCH) para. 8081 at 3358 (1980) (Daniel, Arb.).

170. *Id.* at 3360.

171. 82 Lab. Arb. (BNA) 1209 (1984) (Kaplan, Arb.).

that such requests to admit or confess were improper in the private sector, "but certainly more so in the federal sector."<sup>172</sup> Kaplan first noted that the employer has the burden of proof in a disciplinary case, and he may not shift that burden to the employee by requesting a confession. Secondly, he pointed out that labor relations in the federal sector are protected by due process safeguards as well as constitutional guarantees. Arbitrator Kaplan explained that a federal-sector employee "may decline to respond to a Notice to Admit or to any interrogatories if that employee has a reasonable basis for believing that such information may form a link in a chain of evidence that may result in criminal penalties."<sup>173</sup>

### C. Summary and Analysis

What rules or principles do arbitrators follow when employees assert fifth-amendment type arguments in an arbitration proceeding? When management offers the grievant's statements or testimony at an arbitration hearing, the weight to be accorded the grievant's confession or other self-incriminating statement will be assessed in the light of all the conditions under which it was obtained. When it can be demonstrated that a confession has been made out of fear or coercion, and is thus not a reliable expression of truth, an arbitrator can be expected to give it little weight. This is true particularly where the employer offers little or no evidence other than the confession. As stated by the West Coast Tripartite Committee, "[i]nterrogation of employees is a normal and vital prerogative of an employer."<sup>174</sup> While it is to be favored, the committee nevertheless noted that "the concern of the arbitrator at the proffer of evidence of 'confessions'. . . will be for its reliability, and in egregious situations, for its allowability in terms of fair play and reasonable privacy."<sup>175</sup> The Committee concluded as follows:

Emotional strain at accusation and the latent fear of the power of an employer to cause criminal prosecution irrespective of guilt or innocence, render this kind of evidence unreliable, and unless it is demonstrated that reasonable safeguards were observed in the investigation, including the real opportunity for representation, evidence of employee admissions during interrogation should be deemed inadmissible.<sup>176</sup>

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172. *Id.* at 1213.

173. *Id.* at 1213 n.6.

174. REPORT OF THE WEST COAST TRIPARTITE COMMITTEE, PROBLEMS OF PROOF IN ARBITRATION, PROCEEDINGS OF THE 19TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 149, 205 (1966).

175. *Id.*

176. *Id.*

Suppose the grievant refuses to cooperate and remains silent at all times? Although the fifth-amendment privilege against self-incrimination is not applicable in a non-governmental setting,<sup>177</sup> some arbitrators, while recognizing the non-applicability of the Constitution in labor arbitration, will nevertheless consider the due process standards that are traditionally applied in the criminal law setting. This is especially true where the alleged misconduct carries the stigma of general social disapproval. Few arbitrators, however, will recognize that an employee has the right to remain silent when management demonstrates a need for information and the misconduct is subject to a published rule.

*King Co.*<sup>178</sup> is a private-sector case illustrating the interaction among a citizen's right to be protected by the fifth amendment, his right to some kind of industrial due process from his employer, and the employee's duty to cooperate in an investigation of misconduct. The decision is reported by Arbitrator Joseph Baird. In *King*, management asserted that four employees vandalized a vehicle of a fellow employee and the vandalization was related to incidents that occurred at the workplace. The employees were dismissed. The company argued that the dismissals should be sustained because three of the four grievants lied to the employer during the investigation of the incident. Arbitrator Baird found that the application of the work rule against "lying to an employer" was impermissible in this context. He reasoned that, in effect, management sought to compel the grievants to implicate themselves in a criminal action before the matter came to court (all four grievants were charged with criminal damage to property). Arbitrator Baird found that the confession of one of the grievants played a critical part in their arrest and conviction, and that "there can be little doubt that the Fifth Amendment of the Constitution creates a privilege against self-incrimination which is available outside of the criminal court proceedings . . ."<sup>179</sup> With regard to when an employee had a duty to cooperate in an investigation, Arbitrator Baird stated the rule this way:

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177. In some jurisdictions testimonial privileges may be operative in a private-sector arbitration proceeding. For example, Arbitrator Cheter Brisco commented:

While the arbitration statute in California declares that the rules of evidence do not apply, it is stated elsewhere that privileges apply to all hearings. An arbitration is defined as a hearing. Therefore, if a privilege against self-incrimination is asserted in an arbitration, the arbitrator should sustain the privilege.

PROCEDURAL RULINGS DURING THE HEARING, ARBITRATION 1982: CONDUCT OF THE HEARING, PROCEEDINGS OF THE 35TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 138, 145 (1983) [hereinafter PROCEDURAL RULINGS].

178. 89 Lab. Arb. (BNA) 681 (1987) (Baird, Arb.).

179. *Id.* at 685.



While it is inappropriate for an employee to lie to an employer about a matter related to the *conduct of his job*, he ought not to be punished by his employer for failing to cooperate in an investigation which could lead to his incarceration, particularly one concerning an incident which did not occur at work.<sup>180</sup>

Arbitrator Baird correctly points out that any investigation management makes should be related directly to an employee's specific job. Difficult questions arise, however, when the matter under investigation involves an employee's present fitness for work because of off-duty considerations.

In general, arbitrators are reluctant to sustain discipline or discharge based on off-duty misconduct (i.e., conduct that occurs off the premises during non-working time) absent some relationship or "nexus" to the job. The reason for this principle was well expressed by Arbitrator Clair Duff twenty-five years ago in his often-cited *Chicago Pneumatic Tool Co.*<sup>181</sup> decision. There Arbitrator Duff sustained the dismissal of a welder with 16 years' seniority who pleaded guilty to a narcotics offense: attempting to twice obtain cocaine by misrepresenting a physician's prescription obtained by another person. Duff warned that arbitrators should be reluctant to sustain discharges for off-duty conduct "lest Employers become censors of community morals."<sup>182</sup> He nevertheless agreed that "where socially reprehensible conduct and employment duties and risks are closely related, conviction for certain types of crimes may justify discharge."<sup>183</sup>

It is of note that Mr. Duff, quoting with approval the company's answer in the lower steps of the grievance procedure, recognized "reputation" and the morale of fellow employees as legitimate company considerations. According to Arbitrator Duff, management "is not obligated to continue in its employ employees who commit offenses involving moral turpitude especially where a conviction is involved."<sup>184</sup>

Likewise, in *Fairmont General Hospital*,<sup>185</sup> Arbitrator Alfred Dybeck considered the discharge of a hospital maid for shoplifting at a local department store.<sup>186</sup> Because the hospital had experienced a recent problem of theft, and even though the maid was not accused of stealing from the hospital, the arbitrator upheld discharge because her actions created serious

180. *Id.* (emphasis in original).

181. 38 Lab. Arb. (BNA) 891 (1961) (Duff, Arb.).

182. *Id.* at 891-892.

183. *Id.* at 893.

184. *Id.*

185. 58 Lab. Arb. (BNA) 1293 (1972) (Dybeck, Arb.).

186. *Id.* at 1293-94.

doubt as to her trustworthiness as an employee.<sup>187</sup> , Arbitrator Dybeck outlined the controlling principle in off-duty conduct cases as follows:

While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that an employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved.<sup>188</sup>

Arbitrator Harvey Nathan, in a decision involving a discharge of a firefighter for off-duty misconduct, expressed the principle adopted by most arbitrators in off-duty conduct cases this way:

[T]he generally accepted standard among arbitrators is that proof of off-duty misconduct, even when serious and/or criminal, does not justify automatic discharge. An employer must show that the conduct has a *demonstrable* effect on the employer's business. In this regard, saying it does not make it so. An employer must do more than simply make the pronouncement that it has or will be injured by retaining an employee who has engaged in off-duty misconduct.<sup>189</sup>

Arbitrator Nathan concluded that the particular crime involved, theft and possession of stolen property, "renders the grievant particularly unsuited for fire fighting."<sup>190</sup>

Marvin Hill and Mark L. Kahn, in an address before the National Academy of Arbitrators, have summarized most of the criteria arbitrators apply in off-duty cases as follows:

Whether the nexus is sufficient to overcome the presumption that an employee's off-duty behavior is not subject to the employer's control is, as we have seen, dependent on many considerations. The characteristics of the employer may be critical. If it is claimed that the off-duty misconduct had adversely affected or will harm the company's reputation or sales, or both, this may be of greater concern for firms that operate in highly competitive, consumer-oriented markets (e.g., airlines, retail stores, private schools, health clubs, day-care centers) than for oligopolistic firms with produced-oriented markets.

The location of the employer may be a factor. A prominent employer in a small isolated town may be legitimately more sensitive to scandal

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187. *Id.*

188. *Id.* at 1295.

189. This decision was unpublished (emphasis in original).

190. *Id.*

based on off-duty misconduct than an anonymous employer in a large metropolitan area.

The nature of the misconduct: Violent, destructive, or perverted actions may reinforce the nexus more than crimes of the so-called white-collar variety (e.g. tax evasion). A misdemeanor (e.g., marijuana possession) is much less likely to be considered just cause for discharge than a felony (e.g., marijuana sales).

The occupation of the offender. Many decisions [in the off-duty area] have hinged on a link between the employee's job duties and obligations and the content of the misconduct. It is not hard to demonstrate a nexus when a police officer commits a felony off-duty, when a teacher molests a child off-duty, when a sales clerk is convicted of shoplifting (from someone else's store), or when a bank teller has embezzled funds from his church's treasury. The extent and nature of the grievant's customer contacts are important, especially if they relate to the type of misconduct. Committers of sex crimes or property thefts will probably not be retained in jobs that entail entering customers' homes.

Finally, there is the extent and kind of publicity. When the public's attention has focused on the misconduct and the miscreant has been clearly identified with the employer, the nexus is reinforced. Often, of course, it is the publicity that caused the employer to become aware of the off-duty misconduct.<sup>191</sup>

The important consideration is that if management's internal investigation concerns conduct away from the workplace on the employee's own time, it may have difficulty sustaining the dismissal of an employee for failure to cooperate if the employer cannot establish a direct nexus or relationship between the employee's job and the off-duty conduct. Alleging that a nexus exists will not make it so. Most arbitrators require that management demonstrate by hard evidence the impact that the employee's conduct has on the employer's business. As Arbitrator Arthur Ross observed, the answer as to whether there is a nexus will not be found by "comparing the intrinsic culpability of different grievants."<sup>192</sup>

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191. M. HILL & M. KAHN, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards*, in ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE 39TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 121-54 (1986).

192. *Id.* at 154. (citing A. ROSS, Discussion, *The Criminal Law and Industrial Discipline Labor Arbitration—Perspectives and Problems*, in PROCEEDINGS OF THE 17TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (1964)).

### D. Related Issues Confronting Arbitrators and Advocates

#### 1. What Constitutes a Refusal to Cooperate in an Investigation?

An employee who declares that he is not answering any questions, or refuses to even show up for the investigation,<sup>193</sup> clearly is refusing to cooperate and can be dealt with accordingly. The reasoning would also apply to an employee that refuses to execute a written statement indicating what he knows about a specific incident.<sup>194</sup> Refusals to cooperate may take additional forms, some of which are beyond management's jurisdiction to assess discipline. Common examples include employees who refuse drug or polygraph tests<sup>195</sup> and employees who refuse management access to their personal lockers or cars.<sup>196</sup> Other cases arise when a union steward has information that management desires, but for whatever reason, the steward refuses to disclose.<sup>197</sup>

Should it matter whether the employee has been directed by outside counsel to keep quiet? Most, but not all, arbitrators will find little sympathy for an employee who asserts that he cannot talk to his employer about an

193. AT & T Communications, 94 Lab. Arb. (BNA) 1229 (1990) (Kaufman, Arb.) (refusing to meet with management to discuss warnings).

194. City of Highland Park, 95 Lab. Arb. (BNA) 1089 (1990) (Daniel, Arb.) (failure to submit report in timely manner and failure to attend meeting).

195. See *infra* note 228 and accompanying text.

196. See, e.g., Kroger Co., 51 Lab. Arb. (BNA) 251, 253 (1968) (Schieb, Arb.).

197. Loomis Armored Inc., 94 Lab. Arb. (BNA) 1097 (1990) (Gentile, Arb.). In *Loomis*, Arbitrator Joseph Gentile ruled that just cause existed to discipline a union steward who refused to disclose to an armored car company the names of employees whom he interviewed during his investigation of the disappearance of a bag containing approximately \$31,500. The employer characterized the Grievant's action as "failure to cooperate." *Id.* at 1100. The union argued that the information was "privileged" as the Grievant was acting as a union steward. Although the arbitrator found that the investigation was accomplished within the ambit of his union steward duties, he nevertheless ruled that there was no privilege under this evidence record. According to Arbitrator Gentile, the instant situation did not involve communication between a steward and a grievant, but between the Grievant steward and persons interviewed during his investigation on behalf of an employee who had made an inquiry and was not a grievant at the time. *Id.* at 1101. Arbitrator Gentile reasoned as follows:

What was highly persuasive in reaching this conclusion was the nature of the employer's business, the importance of the employer's investigation and the absence of a "Grievant-union" situation which would create this type of a "privilege," if such a "privilege" should be extended at all.

*Id.* It is of note that although the arbitrator sustained the discipline, he did rule that a three-day suspension should be reduced to a written warning.

event specifically related to his job because his attorney has advised him that he should keep quiet in light of anticipated or concurrent criminal proceedings.<sup>198</sup>

## 2. Refusal to Testify and Arbitral Inferences

What inference should an arbitrator make when an employee comes to the hearing but refuses to testify? Not infrequently in arbitrations involving theft the grievant will have a case pending in criminal court for the same theft. Should it make a difference whether the grievant refuses to testify because there is a pending proceeding in another forum?

Advocates frequently choose not to call the grievant to testify. Indeed, in some cases the grievant may not even be present at the hearing. This strategy presents questions of the inferences that may be drawn from the grievant's refusal to testify when the other side has put into evidence facts adverse to the grievant. Assume that the grievant is fired for theft, and at the hearing a management witness (otherwise credible) testifies that he saw the grievant take company property and place it in his car. If the grievant does not take the stand and deny that he took the property, chances are good that the arbitrator will hold that the facts as alleged by the witness are true. The grievant need not testify at the hearing (or even be present for that matter); some arbitrators give routine lip-service to the notion that no adverse inference will be drawn, but it is clear that a fact can be resolved against the grievant if he "sits back" while allegations of fact are made. The advocate may attempt to convince the arbitrator that important considerations mandate not taking the stand (such as a pending criminal trial), but the arbitrator is unlikely to be moved.

An explanatory note is in order. Consistent with the Supreme Court's holding in *Griffin v. California*,<sup>199</sup> that the accused has a constitutional right not to testify and no adverse inference can be drawn from this failure, some arbitrators have gone on record stating that they will not draw *any* inferences from a refusal to testify. Thus, Arbitrator John Sembower, in *American International Aluminum Corp.*,<sup>200</sup> has declared that he "disregards any adverse inferences which might be drawn from the Grievant's not being present at the hearing."<sup>201</sup> While noting that an arbitration is not a criminal matter, he nevertheless reasoned that "there is an inescapable analogy between

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198. See, e.g., *Marigold Foods*, 94 Lab. Arb. (BNA) 751, 754 (1990) (Bognanno, Arb.) (where the arbitrator sustained the dismissal of employee for refusing to submit to a drug test, rejecting grievant's argument that he did so on advice of counsel).

199. 380 U.S. 609 (1965).

200. 68 Lab. Arb. Awards (CCH) para. 8591 at 5042 (1968) (Sanbower, Arb.).

201. *Id.*

the absence from an arbitration hearing of the Grievant in a disciplinary case and the rule of law that a defendant in court may not be required to take the stand if he chooses not to do so.<sup>202</sup> Accordingly, the grievant's refusal to testify should not be held against him.

An examination of arbitral opinions indicates that arbitrators do in fact draw inferences from the grievant's failure to testify, although it is sometimes unclear just how the inference may operate. Neutrals have recognized that there are many reasons why a grievant might not testify, including the fact that some persons make poor witnesses because of their demeanor, their inability to respond to direct questions, and their tendency to become rattled. Advocates in both the judicial and arbitral forums will keep a witness off the stand "not because he is dishonest, but because he is bumbling, inarticulate, unintelligent, or easily confused or confounded, one in whose mouth the truth may indeed lie, but never to be dislodged."<sup>203</sup> For these reasons arbitrators have not assumed that the most logical inference to be drawn from a grievant's failure to testify is that he would only give testimony damaging to his cause. The more-reasoned position mandates that before any negative inferences are to be drawn from a failure to testify, the employer must establish a *prima facie* case.<sup>204</sup> Once that task is satisfied, however, an arbitrator may well resolve an uncontested fact against the grievant. Although an arbitrator may not assert that he is finding for the employer on a specific issue because the grievant (or, for that matter, some other witness) did not contest the facts as alleged by management, still it is not unexpected that the employee's case is necessarily weakened when an important witness fails to challenge otherwise damaging evidence.

Advocates are advised to never let a fact that is being contested go uncontested. If alleged facts adverse to the employee-grievant are not contested (in some manner, either by the grievant himself or some other

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202. *Id.* at 5045.

203. PROBLEMS OF PROOF IN THE ARBITRATION PROCESS: REPORT OF THE WEST COAST TRIPARTITE COMMITTEE, in PROBLEMS OF PROOF IN ARBITRATION: PROC. OF THE 19TH ANN. MEETING OF THE NAT'L ACAD. OF ARBITRATORS 149, 201 (1967).

204. The distinguished and late Arbitrator Peter Seitz articulated the better position as follows:

I don't use adverse inferences. I decide the case on the evidence that is before me. If people refuse to testify, including grievants, there is simply no testimony against them. If the employer's evidence justifies a discharge—shows there is just cause for a discharge—I will uphold a discharge . . . .

PROCEDURAL RULINGS, *supra* note 177, at 145.

witness), the award may issue where the arbitrator declares something to the effect that, "the company witness alleged and Grievant did not deny . . . ."205

With respect to the special situation where the grievant has a criminal case pending, while it may be understandable why he would refuse to testify, the better arbitrators will decide the case based on the evidence before them. If management's evidence shows there is just cause for a discharge, it will be upheld notwithstanding grievant's reasons for not taking the stand. Many arbitrators will not order the grievant to testify, but this does not mean that uncontested facts will be resolved as if the grievant denied them under oath. The arbitrator may talk about and even sustain the privilege<sup>206</sup> but nevertheless draw an adverse inference against the grievant.

### 3. Assistance of Counsel

Suppose the employee asks to have counsel present at the investigation in addition to his union representative? Some employees not only ask to have an attorney present, but request that management produce eyewitnesses so that their attorney can proceed to cross-examine the witnesses prior to the arbitration hearing.

Arbitration procedures rarely call for pre-hearing discovery and the exchange of witness lists and cross-examination of witnesses prior to hearing unless (1) these pre-hearing procedures have been specifically instituted for the case; or (2) a provision mandating discovery is found in the collective bargaining agreement. And with good reason. The essence of arbitration is to avoid the procedural complexities that make litigation comparatively slow and costly. As pointed out by Judge Learned Hand, arbitration may or may not be a desirable substitute for trials in courts, but that is for the parties to decide in each instance. Once the parties adopt a grievance-arbitration provision, they must be content with its informalities and not hedge about with

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205. See, e.g., *American Steel Foundries (Indiana Harbor Works)*, 94 Lab. Arb. (BNA) 745, 747 (1990) (Seidman, Arb.) (Arbitrator declared that "the Constitutional safeguards supporting the 'presumption of innocence' are not applicable in an arbitral forum. The Grievant can be called as a witness by the Company and compelled to give testimony against himself. His failure to be called by the Union can be utilized against him by the finder of fact."); see also *City of San Antonio*, 90 Lab. Arb. (BNA) 159, 162 (1987) (Williams, Arb.) (Compelling police officer to testify at his arbitration hearing does not violate privilege against self incrimination, reasoning that "privilege against self-incrimination is largely related to admissions or confessions in a criminal setting. . . . Thus, the primary application of self-incrimination in arbitration, if any at all, relates to an interest in fair procedure.").

206. Some arbitrators would even warn the grievant to get a lawyer because if he starts answering questions regarding a theft where a criminal case is pending, he may waive his privilege. PROCEDURAL RULINGS, *supra* note 177, at 145.

those procedural limitations which it is precisely its purpose to avoid.<sup>207</sup> If the purpose of arbitration is to avoid the cost and delay of the judicial process, and at the same time, serve as a substitute for a strike, the better rule, absent a specific provision in the parties' labor agreement, is not to encumber arbitration with all the formalities of a court trial.

As far as counsel's presence, private-sector arbitration is a private proceeding conducted under the parties' collective bargaining agreement. Absent a provision in the labor agreement, a grievant-employee has no right to have outside counsel present at the hearing, although under *NLRB v. J. Weingarten*,<sup>208</sup> an employee does have the right to have a union representative present at an investigatory meeting where discipline is a possibility.<sup>209</sup> We submit that the same rule applies in the public sector.<sup>210</sup>

#### 4. Existence of Rules or Regulations

Does management need a specific rule or regulation requiring that employees cooperate in investigations before an employee can be disciplined for failure to cooperate? Few arbitrators or courts would hold that management would be precluded from interviewing its employees in cases involving a bona fide need for information because no plant rule provided management with this right. Management does not look to the parties' collective bargaining agreement or to its rules and regulations to determine what it can do by way of obtaining information from employees. Absent a provision to the contrary (we doubt that there is such a collective bargaining agreement in existence), management can require that employees fully participate in internal investigations even when the parties' collective bargaining agreement is silent on the issue.

Before sustaining discipline or discharge for insubordination, however, arbitrators have required that management's order be clear and that the

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207. *American Almond Prod. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (Hand, J.).

208. 420 U.S. 251, 257 (1975) (Holding that employee is entitled to union representation during investigatory phase of disciplinary interview where (1) employee "reasonably believes the investigation will result in disciplinary action," and (2) "where the employee requests representation."). See generally M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* 255-57 (1991).

209. For an excellent discussion involving third-party participation in an arbitration proceeding, see *PROCEDURAL RULINGS*, *supra* note 177, at 145.

210. In the federal sector, Congress has codified employees' *Weingarten* rights in 5 U.S.C. § 7114(a)(2)(B) (1988), and agencies are annually required to inform employees of their *Weingarten* rights.



employee be told exactly what the penalty is for disobeying the order.<sup>211</sup> An employer who requires employees to fully cooperate in an investigation need do no more than state what is expected of the employee, that is, tell what he knows (in the language of perception, the so-called "verbs") or face dismissal. An employer who fails either task risks having discipline overturned by an arbitrator.

A different rule, however, may apply when management's investigation requires an employee to submit to a drug or polygraph test.

### 5. Special Applications: Drug and Polygraph Tests

Can an employee be disciplined for failure to participate or cooperate in an investigation where the company's "investigation" requires that the employee submit to a drug or polygraph test?

#### *a. Refusals to Submit to Drug Tests*

As pointed out by one arbitrator, "arbitration precedent dealing with drug testing is not yet a coherent body of doctrine. Most cases turn on the particular facts presented to the arbitrator, and precedent is thus of limited value."<sup>212</sup> Still, where management has a rule or policy providing for testing and employees have been so notified, most arbitrators, tracking constitutional law,<sup>213</sup> hold that when there is a reasonable basis to test, management can

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211. A. KOVEN & S. SMITH, *JUST CAUSE: THE SEVEN TESTS* 69 (1985) states the following:

[N]otice is still at the heart of many insubordination cases. If an employee is to be disciplined (and especially discharged) for disobeying a supervisor's order, the order itself must meet two fundamental criteria with respect to notice: First, the order must be clear and specific enough to let the employee know exactly what is expected of him. Second, the employee must be told exactly what the penalty will be for refusing to comply.

See also M. HILL & A. SINICROPI, *MANAGEMENT RIGHTS* 506-07 (1986) (footnote omitted) which states the following:

[T]hree requirements must be satisfied before arbitrators uphold a discharge for insubordination: (1) the company must demonstrate that the instructions were clear and that the grievant understood the directives; (2) the instructions must be understood to be an order, not just a request; and (3) the individual must understand the penalty that may be imposed for being insubordinate. Even when the three requirements are satisfied, the grievant's work record and length of service may still operate to reduce the penalty imposed by management.

212. *Regional Transp. Dist.*, 94 Lab. Arb. (BNA) 117, 123 (1989) (Mogler, Arb.).

213. The taking of blood constitutes a search and seizure within the meaning of

effect the termination of an employee for insubordination when the employee refuses the drug test.<sup>214</sup> In this regard Hill & Sinicropi conclude that

[M]ost arbitrators will uphold discipline or even dismissal when an employee refuses to take an examination so long as management can establish a reasonable basis in fact (probable cause in the public sector) for believing that the employee was under the influence. Alternatively, when a test is refused, an arbitrator may simply conclude that the employee was under the influence and not bother to rule on the question of whether discipline was proper for refusing the examination. Whichever alternative is chosen, the end result is the same. The suspected drug user is disciplined or terminated from employment.<sup>215</sup>

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the fourth amendment. *Schmerber v. California*, 384 U.S. 757, 766 (1966). Similarly, the taking of a urine sample is a search and seizure under the fourth amendment. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Drug testing by a private employer does not constitute state action, subject to the fourth amendment, *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), unless a close nexus exists between the government and the employer. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) (holding railroad drug testing required by Federal Railway Administration constitutes governmental action subject to fourth amendment). Random testing by a public employer is prohibited absent probable cause or, in most cases, reasonable suspicion that an employee is under the influence or impaired. *Serpas v. Schmidt*, 808 F.2d 601 (7th Cir. 1986) (random search of race track personnel unconstitutional). *See also Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (periodic testing as part of physical exam unconstitutional absent on-the-job impairment); *Patchoque-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325 (1987) (school board prohibited from performing drug screens as condition of teacher being considered for tenure, absent reasonable suspicion based on supportable objective facts and pursuant to established administrative standards).

In certain professions, random drug testing has passed constitutional muster. *See Transport Workers' Union of Philadelphia, Local 234 v. Southwestern Penn. Transp. Auth.*, 517 F.2d 456 (3d Cir. 1988) (employees in safety sensitive jobs); *Policeman's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (police officers); *Schall v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (high school athletes); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (engineers at nuclear power plant); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys, prison guards).

214. *See, e.g., Ethyl Corp.*, 95 Lab. Arb. (BNA) 632 (1990) (Blum, Arb.) (sustaining discharge for refusing to provide more than one urine sample); *Linde Gases of the Midwest*, 94 Lab. Arb. (BNA) 225 (1989) (Nielson, Arb.) (refusing to submit to alcohol screen).

215. M. HILL & A. SINICROPI, *supra* note 208, at 189. *See also Flannery, Termination of Employment for Refusal to Submit to a Drug Test*, 40 LAB. L.J. 293-301 (1989).

Another source states the rule followed by the arbitral community this way:

It is a basic principle of industrial relations that an employee must "obey now, grieve later;" he has few justifications to refuse an order. He is insubordinate if he refuses to comply with a legitimate work order that does not raise a bona fide fear for his safety or a bona fide belief that his contractual rights will be violated if he obeys the order. Under the latter exception, where no rule or policy provides for drug testing, or employees have not been notified of the policy or that they will be fired for refusing to take the test, arbitrators will reinstate employees discharged for refusing to take the test. If the policy is clearly in place and employees are notified of the consequences of refusal to submit to drug tests, some evidence that the order to submit was based on a desire to harass, or other arbitrary or capricious conduct, may mitigate the consequences of an insubordinate refusal to submit. Many arbitrators, however, will find that insubordination is inexcusable where employees know of a rule, and that the employee's proper course of action is to give a sample and grieve afterward for a remedy.<sup>216</sup>

Suppose management's rule is unreasonable, such as when an employer promulgates a rule requiring any employee returning from a leave of absence to submit to a drug test?<sup>217</sup> Arbitrators disagree on the proper remedy for employees discharged for refusing to submit to a drug tests that were improperly required. Some arbitrators have held that where management makes an unreasonable request for a drug test, a discharge arising from an employee's refusal to submit is not reasonable.<sup>218</sup> One solution is to reinstate the employee to his former position, but without backpay on the ground that he failed to mitigate damages by refusing to comply with the order and subsequently filing a grievance.<sup>219</sup> Arbitrator Winograd, however stated that

There is an equitable unattractiveness to such a remedy. Undoubtedly, an employee who was not involved in drug usage could have avoided discharge by allowing the employer to confirm that fact through a drug test. An employee who would have failed a drug test had he submitted to it may

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216. R. DECRESE, DRUG TESTING IN THE WORKPLACE 194-95 (1990).

217. See, e.g., Day & Zimmermann, 94 Lab. Arb. (BNA) 399 (1990) (Nicholas, Arb.) (holding testing of employees returning from leaves of absence unreasonable as impermissible attempt to control off-duty conduct).

218. Pacific Gas & Elect., 88 Lab. Arb. (BNA) 194 (1988) (Koven, Arb.); Fruehauf Corp., 88 Lab. Arb. (BNA) 366 (1986) (Nathan, Arb.); Gulf Atl. Dist. Serv., 88 Lab. Arb. 475 (1985) (Williams, Arb.).

219. Arbitrators have held that employees have an affirmative duty to mitigate damages. See M. HILL & A. SINICROPI, *supra* note 173, at 214-23.

have salvaged his employment by refusing to take the test, but he should not be rewarded for having "dodged a bullet."<sup>220</sup>

Arbitrator Winograd concluded that application of the "obey now, grieve later" principle would render an employee's expectation of privacy meaningless because the employee cannot undo that invasion by successfully prosecuting a grievance.<sup>221</sup> He accordingly reinstated the employee with full backpay and benefits (less any interim earnings and unemployment compensation).

In another decision, Arbitrator Richard Canner stated that an employee need not cooperate in an investigation regarding misconduct (in this case, competition with the employer's business) where management has not established a clear rule against the conduct it wishes to prohibit.<sup>222</sup> The arbitrator's reasoning is noteworthy:

The Company argues that grievant's refusal to answer [management's] questions relative to the type of business he was engaged in was insubordination. Grievant refused to answer these questions, stating that he first wanted to consult with his attorney. However, to the date of the arbitration hearing, grievant never volunteered any response to these questions.

I am of the view that, where an employee violates a clear work-related rule, he has a duty to cooperate with the employer to the extent of answering questions relative to the violation. If the employee is innocent or has a defense of extenuating circumstances, a failure to answer questions or deny the employer's charges tends to lead the employer astray. Hence, if in the face of such lack of cooperation, the employee is substantially found innocent after an arbitration hearing, the employer should not be penalized by an award of back pay. The rationale underlying such principle is that, at least arguably, the employer might not have discharged or disciplined the employee if he had cooperated and given the employer his version of the facts in dispute.

But such principle is not applicable where, as here, the employee is not alleged to be guilty of violating a specific rule which, because of its tenuous and ambivalent relationship to work performance and production, was required to be articulated by the employer. It follows that in such a case the employee has no duty to answer questions of the employer since these questions do not pertain to any work-related violation.<sup>223</sup>

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220. Utah Power & Light Co., 94 Lab. Arb. (BNA) 233, 243 (1990) (Winograd, Arb.).

221. *Id.* at 243. See also Temtex Prods., 75 Lab. Arb. (BNA) 233 (1980) (Rimer, Arb.).

222. Northern Rebuilders Co., 96 Lab. Arb. (BNA) 1, 4 (1990) (Canner, Arb.).

223. *Id.* at 4.

Although Arbitrator Canner sustained the grievance, it is unclear whether the grievant was reinstated with backpay.

As a general rule, even when the grievant is ultimately successful on the merits, arbitral authority supports the proposition that resort to self-help, rather than to the grievance procedure, will disqualify an employee from the right to "make whole" back-pay relief.<sup>224</sup> An exception with respect to those employees who resort to self-help is suggested by Prasow and Peters. They point out that, in these exceptional cases, employees may rely on two basic criteria applied by the courts when considering petitions for injunctive relief:

1. Will the damage suffered by the petitioner be irreparable if he subsequently proved to be the victim of an illegal wrongful action?
2. Will the damage to the petitioner be substantial enough to warrant restraining the other party, who might be subsequently proved to be in the right, and in turn suffer needless harassment, perhaps irreparable damage, by the restraining order?<sup>225</sup>

They argue that if the employee could meet these tests, it would seem inappropriate for an arbitrator to take an inflexible position against self-help.<sup>226</sup>

*b. Refusals to Submit to a Polygraph Test*<sup>227</sup>

Although now significantly limited by statute,<sup>228</sup> when permitted by

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224. Besides the cases discussed in this section, see *Neimand Indus.*, 88 Lab. Arb. Awards (CCH) para. 8070 (1987) (Sergent, Arb.) (no back pay where grievant uncooperative in production of documents and information relating to grievance); *Gulf Atl. Distribution Servs.*, 87 Lab. Arb. Awards (CCH) para. 8013 (1986) (Williams, Arb.) (reinstatement, but no back pay for insubordination and withholding information).

225. P. PRASOW & E. PETERS, *ARBITRATION AND COLLECTIVE BARGAINING* 224 (1970).

226. *Id.* at 225-30.

227. An expanded discussion of this issue is found in M. HILL & A. SINICROPI, *supra* note 119, at 199-228.

228. The Employee Polygraph Protection Act of 1988 ("EPPA"), 29 U.S.C. §§ 2001-2009 (1988), prohibits the use of the polygraph by most private-sector employers for pre-employment screening or random testing. The EPPA also significantly restricts the use of the polygraph in workplace investigations. Public-sector employers are excluded from the Act's coverage. *Id.* § 2006(a). The law does not apply to tests given by the federal government to certain private individuals engaged in national security activities. *Id.* § 2006(b). There is also a security services exemption for firms whose primary business consists of providing armored car personnel, persons engaged in the design, installation and maintenance of security

law, employees may be disciplined for refusal to submit to a polygraph test. Arbitrators are in sharp disagreement on this issue. With respect to constitutional and privacy considerations, the better rule has been stated by Arbitrator Stanley Sergent, Jr., in *Orthodox Jewish Home for the Aged*.<sup>229</sup> He held that management had the right to require employees to submit to a polygraph examination as part of an investigation of an assault and robbery at a nursing home (despite the fact that not all employees were required to take the test).<sup>230</sup> Arbitrator Sergent disposed of constitutional and privacy arguments by asserting that the "easy answer" is simply that the Constitution applies only to state action against an individual or property and does not govern the

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alarm systems, or other uniformed or plainclothes security personnel. *Id.* § 2006(e).

A major exemption is the "ongoing investigation" exception where an employer may request a current employee submit to a polygraph if the employee meets four conditions: (1) the test must be administered in conjunction with an ongoing investigation involving economic loss or injury to the employer's business (*id.* § 2006(d)(1)); (2) the employee has access to property that is the subject to the investigation (*id.* § 2006(d)(2)); (3) the employer had reasonable suspicion that the subject was involved in the activity or incident under investigation (*id.* § 2006(d)(3)); and (4) the employer executes a statement setting forth the specific incident under investigation and provides it to the examinee 48 hours before the testing (*id.* § 2006(d)(4)).

The statute also mandates that additional supporting evidence, beyond the results of the test or refusal to take the test, is required before an employee can be discharged, disciplined, or denied promotion, or otherwise discriminated against in any manner. *Id.* § 2007(a)(1). Any employee affected by an employer violation may commence a private civil action, *id.* § 2005(c)(1), and is entitled to such legal or equitable relief as may be appropriate. *Id.* § 2005(c)(1). Administration of tests to determine whether an employee has used drugs is prohibited. 29 C.F.R. § 801.12(d) (1988). *See also* *City of Warrensville Heights v. Jennings*, 6 IER Cas. (BNA) 597, 597-99 (Ohio 1991) (just cause existed to deny unemployment compensation and dismiss police officer for refusal to submit to polygraph to confirm that he was not involved in off-duty drug use); *Jackson v. Hudspeth Center*, 6 IER Cas. (BNA) 108, 109 (Miss. 1990) (no due process violation by state facility for retardation for dismissal of employees refusing to take polygraph exam during investigation of resident's injury, reasoning "it was the duty of the appellants to cooperate with Hudspeth Center in the investigation of the incident."); *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (Ariz. Ct. App. 1977) (Upholding dismissal of police officer for refusing to submit to polygraph stating, "[t]he criteria for determining such a test in the course of an internal investigation are that the officer must be informed (1) that the questions must relate specifically and narrowly to the performance of his official duties, (2) that the answers cannot be used against him in any subsequent criminal prosecution, and (3) that the penalty for refusal is dismissed . . .").

229. 91 Lab. Arb. (BNA) 810 (1988) (Sergent, Arb.).

230. *Id.* at 814-15.

voluntary relationship between an employer and employee.<sup>231</sup> Sergent pointed out that "although compelling and useful in defining the issues raised in such cases, the analogy to constitutional law in labor arbitration is limited."<sup>232</sup> Constitutional rights "protect the individual from unwarranted intrusion by the state and they do not readily translate into the more voluntary and private relationship between employer and employee."<sup>233</sup> No unrestricted parallel to labor arbitration exists, according to Sergent.<sup>234</sup>

With respect to the employee's privacy rights, the Arbitrator concluded that "the employee's personal integrity and rights of privacy are and should be recognized and jealously protected in labor arbitration settings just as they are in criminal constitutional law."<sup>235</sup> He noted, however, that in both settings "the individual's right of privacy is not absolute, yielding instead at times to more compelling social interests."<sup>236</sup> In the arbitrator's eyes, the polygraph itself is no more inherently intrusive upon individual privacy "than other accepted means of gathering evidence and determining truth such as taking blood or urine tests or even fingerprinting."<sup>237</sup> In light of the evidence record, the arbitrator, while denying the grievance, ordered that the employee either be discharged or be given another chance to take the polygraph test, "the refusal of which will result in his discharge being upheld herein."<sup>238</sup>

Similarly, in *Grocers Supply Co.*,<sup>239</sup> Arbitrator Ralph Roger Williams upheld the dismissal of an employee for refusing to take a lie detector test where the employee, upon being hired, signed the following statement: "I, [grievant], do hereby agree to submit to a Polygraph Test during my employment for Grocers Supply Company at any time the company may request. I fully understand that refusal to do so will be sufficient cause for dismissal."<sup>240</sup>

When the company was notified by the local police department that a vehicle registered in the name of an employee had been found containing some \$5,000 worth of the company's merchandise, the employer asked him to take a polygraph.<sup>241</sup> The grievant first agreed, but after talking to the

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 816.

236. *Id.*

237. *Id.* at 815-16.

238. *Id.* at 816.

239. 75 Lab. Arb. (BNA) 27 (1980) (Williams, Arb.).

240. *Id.* at 28.

polygraph examiner decided not to take the test.<sup>242</sup> After declaring that the eventual use of the test results and whether they would be admissible in an arbitration hearing was not at issue, Arbitrator Williams ruled that employees may be required to undergo polygraph tests as a part of an investigation.<sup>243</sup> They may be disciplined or discharged for refusal to submit to such a test. This is especially true when the employees sign a statement when they are hired agreeing to submit to a polygraph test during their employment at any time the employer may request. According to the arbitrator, the company acted properly in dismissing the employee because he "refused to follow instructions, and failed to do what he had agreed to do when he was hired."<sup>244</sup>

A case discussing the employee's duty to cooperate with management is *Allen Industries, Inc.*<sup>245</sup> After a supervisor found company materials in two cars parked next to the company's warehouse, the police were called to the scene to question the owners. Both of the employee-owners were taken to the police station and asked to submit to a polygraph.<sup>246</sup> One employee submitted to the test and admitted participating in the theft. The grievant denied knowing how the materials came to be in his car and refused a polygraph examination.<sup>247</sup> He was subsequently suspended by the company.<sup>248</sup> A grievance was filed requesting that he be reinstated. Arbitrator Joseph Klamon, in denying the grievance, focused on the employee's duty to cooperate with management, and not on the guilt or innocence of the grievant. In the words of the arbitrator, the grievant's refusal to take a test "even after the Arbitrator has afforded an opportunity to take such a test at any time within ten days of the hearing does not indicate guilt or innocence in any way."<sup>249</sup> Rather, it indicates "a complete failure to respond affirmatively to requests that appear to us to be reasonable to cooperate with the Company in its effort to find out who was responsible for what happened."<sup>250</sup>

Arbitrator Klamon went on to state that management does not have the right "out of a clear sky to walk out into the plant and to demand that any employees of its selection serve as a spy or as an informer upon fellow employees."<sup>251</sup> According to the arbitrator,

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242. *Id.*

243. *Id.* at 28-29.

244. *Id.* at 29.

245. 26 Lab. Arb. (BNA) 363 (1956) (Klamon, Arb.).

246. *Id.* at 364.

247. *Id.*

248. *Id.*

249. *Id.* at 369.

250. *Id.*

251. *Id.*



while the Company may not require any employee at random or selected in a capricious manner to serve as an informer upon other employees, under pain of discharge, nevertheless it is the duty of every employee to assist the Company in every way to prevent theft of its property or material used in manufacture.<sup>252</sup>

Arbitrator Charles Laughlin, in the often-quoted *Bowman Transportation, Inc.*,<sup>253</sup> decision likewise rejected the argument that forcing an employee to submit to a polygraph had constitutional-type infirmities. He reasoned that "constitutional principles, as such, do not limit the activity of non-governmental organizations."<sup>254</sup>

There may be infirmities with crediting results of a polygraph test, such as its scientific unreliability or the qualifications of the examiner, but there should be no issue as to the constitutional question. Arbitrators who hold otherwise<sup>255</sup> are not applying the law correctly.

Labor arbitrators may endorse an employee's duty to cooperate, but many have taken a hard stand against management when it comes to the issue of the polygraph.<sup>256</sup> If management wants the right to discipline an employee for refusing to take a polygraph exam in an investigation of a theft, it should secure that right in the collective bargaining agreement. In the absence of clear language, the ability to require a polygraph is not an inherent management right.

## 6. Refusals to Testify in Arbitration Proceedings

When, if ever, should an employee be permitted not to testify on behalf of management in an arbitration proceeding? Are there situations where a refusal to testify is protected under the National Labor Relations Act?

Section 8(a)(4) of the National Labor Relations Act, as amended,<sup>257</sup> provides that it is an unfair labor practice for an employer . . . "(4) to discharge or otherwise discriminate against any employee because he has filed

252. *Id.*

253. 61 Lab. Arb. (BNA) 549 (1973) (Laughlin, Arb.).

254. *Id.* at 552. See also *Burns Int'l Sec. Serv.*, 78 Lab. Arb. (BNA) 1104 (1982) (Traynor, Arb.) (holding that plant guards have a special duty to submit to polygraph tests); *Warwick Elect., Inc.*, 46 Lab. Arb. (BNA) 96 (1966) (Daugherty, Arb.) (holding that tests could be required where labor agreement required guards to cooperate with management).

255. See, e.g., *Lag Drug Co.*, 39 Lab. Arb. (BNA) 1121, 1122-23 (1962) (Kelliher, Arb.) (citing rights of privacy and the constitutional right against self-incrimination).

256. See M. HILL & A. SINICROPI, *supra* note 119, at 199-228.

257. 29 U.S.C. § 158(a)(4) (1988).

charges or given testimony under this act.<sup>258</sup> In *NLRB v. Scrivener (AA Electric Co.)*,<sup>259</sup> the United States Supreme Court rejected the view that this section serves only to protect against reprisal for filing an unfair labor practice charge or for giving testimony at a formal hearing. Rejecting a literal interpretation of Section 8(a)(4), the Court held that this section afforded broad protection to an employee who participates in the investigative stage of an NLRB proceeding, including giving a written statement to a field examiner.<sup>260</sup> The NLRB, expanding this doctrine, has found a violation where an employee was disciplined because the employer suspected that a charge was about to be filed.<sup>261</sup>

Related to the arbitral process is *Ebasco Services, Inc.*,<sup>262</sup> where a three-member Board held that an employer violated the statute by demoting three foremen who testified at an arbitral proceeding.<sup>263</sup> Consistent with the rationale of *Scrivener*, the three-member Board declared that:

General Counsel argues that the same rule should apply [protecting employees from reprisal for giving testimony] where employees resort to contractual grievance procedures to vindicate their rights under such contract, and supervisors take it on themselves to appear before tribunals created under those procedures. This argument has merit, for the Act itself recognizes and favors employees' right to use, and actual use of, contract grievance procedures to settle labor disputes, and so do the courts. The Board has specifically protected employees from employer interference with their right to resort to such procedures under contracts, as well as procedures before outside tribunals, to enforce contract rights, on the theory that the filing of claims by employees in either instance was a form of implementation of the collective bargaining agreement and thus an extension of the concerted activity which gave rise to that agreement. In addition, the Board has long followed the statutory policy by withholding its processes in deference to an arbitrator's award under contract procedures where the arbitral process meets certain standards of fairness and regularity. Therefore, it appears to be no more than a reasonable extension of the above principle and Board policy to say that employees have a corollary right to a full and fair hearing on their grievances under contract procedures which must likewise be protected from interference or limitation.<sup>264</sup>

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258. *Id.*

259. 405 U.S. 117 (1972).

260. *Id.* at 123.

261. First Nat'l Bank & Trust Co., 209 N.L.R.B. 95 (1974).

262. 181 N.L.R.B. 768 (1970).

263. *Id.* at 768-69.

264. *Id.* at 769-70.

Accordingly, an employee who is subject to discriminatory treatment because he has given testimony at an arbitration proceeding may be granted relief under the Taft-Hartley Act. There is no safe harbor for an employee who testifies falsely at an arbitration hearing. An employee who gives false statements before an arbitrator can be disciplined notwithstanding the statute.<sup>265</sup>

In *Cook Paint & Varnish Co. v. NLRB*,<sup>266</sup> the Court of Appeals for the D.C. Circuit overturned an NLRB per se rule that an employer may never use a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has been scheduled for arbitration.<sup>267</sup> In that case the employer's attorney sought to interview two employees (Whitwell and Rittermeyer), one of whom was a union representative (Whitwell), in preparation for a discharge grievance scheduled for an arbitration hearing.<sup>268</sup> Although told that the employees were not the subject of the investigation and would not be disciplined for truthful answers, management nevertheless made it clear that they would be subject to discipline for not cooperating. Both employees answered the questions under protest.<sup>269</sup> Neither employee was asked whether he would testify at the upcoming arbitration or whether he had been requested to testify.<sup>270</sup> After the interviews the union filed an unfair labor practice charge, alleging that management violated section 8(a)(1) of the Act by threatening employees with disciplinary action because of their engaging in concerted activity.<sup>271</sup>

The Administrative Law Judge ("ALJ") found a violation, reasoning that management improperly coerced the employees "when it threatened them with discipline if they refused to cooperate by providing information to [management] in the course of its preparation for arbitration . . . ."<sup>272</sup> As an

265. M. HILL & A. SINICROPI, *supra* note 119, at 80, assert the following: While an employer, governed by the National Labor Relations Act, may not discharge an employee for testifying at an arbitration proceeding, testifying dishonestly is not a protected activity. Thus, an employee-witness who deliberately gives false statements in an arbitration hearing is himself subject to dismissal.

*Id.* (footnote omitted). The authors cite two arbitration decisions for this proposition, Wright-Bernet, Inc., 81 Lab. Arb. Awards (CCH) para. 8071, at 3321 (1981) (Strasshofer, Arb.) and Pacific Steel Casting Co., 76 Lab. Arb. (BNA) 984 (1981) (Letter, Arb.).

266. 648 F.2d 712 (D.C. Cir. 1981).

267. *Id.* at 713-14.

268. *Id.* at 713.

269. *Id.*

270. *Id.*

271. *Id.* at 714.

272. *Id.*

alternative holding, the ALJ ruled that "[e]ven if it were to be held that employees generally may not refuse to be interviewed by their employers in preparation for arbitration of a grievance, such rule could not appropriately be applied to Whitwell, who was the shop steward in Thompson's department."<sup>273</sup> The ALJ thus found the interrogation of the steward to be an independent violation of the Act. The Board, applying what appeared to be a blanket rule, ruled that "an employer that seeks to compel its employees to submit to questioning in such circumstances violates Section 8(a)(1)."<sup>274</sup>

Reversing the Board, the appellate court found that the rule announced by the Board "unnecessarily and impermissibly interferes with the manner in which parties to a collective bargaining relationship structure the arbitration process."<sup>275</sup> The court instead held that the legality of pre-arbitration interviews is a contractual matter, "subject only to the normal restraints imposed by the Act that employer conduct not be unlawfully coercive in a particular case."<sup>276</sup> Given the routine practice of parties to interview witnesses days prior to the arbitration, the court found that the Board's rule "established by substantial evidence than an employer demand for a pre-arbitration interview coerces employees in the exercise of protected legal rights."<sup>277</sup> The court went on to note

at that interview, an employer advocate may, perhaps for the first time, obtain factual information from witnesses, observe demeanor, and in general evaluate the merits of a pending dispute. On the basis of the record established by the Board, we are unable to perceive the manner in which such a limited investigation coerces protected employee rights. As a result, we hold that an employee does not have an automatic right to refuse to respond to questions concerning a matter that had been scheduled for arbitration.<sup>278</sup>

The court, however, was careful to designate limits as to how far management may inquire as follows:

An employer may in certain cases be forbidden from inquiring into matters that are not job-related. An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration. In short, we do not here suggest that employers have a carte blanche license to interrogate employees prior to

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273. *Id.*

274. *Id.*

275. *Id.* at 716.

276. *Id.*

277. *Id.* at 716.

278. *Id.* at 716-18.

arbitration; the limits provided by Section 8(a)(1) remain available to prohibit employer conduct in an individual case.<sup>279</sup>

Can the holding in *Cook Paint & Varnish Co.* be extended to the situation where an employer wants to compel an employee to testify on management's behalf at an arbitration proceeding?

In a particularly instructive case, *Retail Store Employees Union, Local 876*,<sup>280</sup> an employee (Anna Pennacchini) of Local 876 was discharged because of her refusal to testify in favor of her employer, in this case Local 876.<sup>281</sup> Her testimony was requested at an unfair labor practice proceeding at which a fellow employee (Frazier) was attempting to "vindicate her statutory rights."<sup>282</sup> Pennacchini first argued that her testimony would have been false because she had no direct knowledge of the matters about which she was to be questioned and that her refusal to testify falsely was protected under section 8(a)(4) of the Act.<sup>283</sup> The employer-union maintained that it had interviewed Pennacchine in regard to its investigation of violations committed by Frazier.<sup>284</sup> Pennacchini had related information to her employer and later flatly refused to testify as to the veracity of the information.<sup>285</sup> The employer did not subpoena Pennacchini at Frazier's hearing.<sup>286</sup> The Board concluded that management violated sections 8(a)(4) and 8(a)(1) of the Act when the employer terminated Pennacchini "because she refused to appear voluntarily as a witness in the unfair labor practice proceeding involving a former co-worker, on the ground that she had no direct knowledge of the matters about which she was to be questioned."<sup>287</sup>

What would the Board's ruling have been if Pennacchini refused to testify on the grounds that her testimony would hurt the union or a fellow bargaining-unit employee? Further, assuming that the employee refuses to testify even with truthful information, does the employer have any alternative to discharge?

Neither the NLRB nor the courts have ruled on the issue whether an employee's refusal to testify at an arbitration hearing is protected under the Act. The rights protected in *Retail Store Employees Union, Local 876*, however, could arguably be applied to such a situation.

279. *Id.* at 718.

280. 219 N.L.R.B. 1188 (1975).

281. *Id.* at 1188-89.

282. *Id.* at 1189.

283. *Id.*

284. *Id.*

285. *Id.* at 1190-91.

286. *Id.* at 1192.

287. *Id.* at 1194.

Additionally, the employer is not left unprotected in his search for the truth. Another line of NLRB decisions address the non-discharge alternative that is available to management. Enforcement of the arbitrator's subpoena is available through the courts as an enforcement of the arbitrator's power to compel production of material evidence under section 301 of the Labor-Management Relations Act (Taft-Hartley).<sup>288</sup> Further, federal and state arbitration statutes may provide enforcement power. The subpoena process, according to the Board, is clearly available provided that the testimony sought is "not plainly incompetent or irrelevant to any lawful purpose of [the party issuing the subpoenas]."<sup>289</sup>

Following this argument, the Board would likely find that an employee's refusal to testify is protected under the Act even though he is refusing to cooperate with management. As such, management will not be allowed to discharge an individual. Rather, the employer's remedy is a court-enforced subpoena if the testimony requested is relevant and truthful to the outcome of the hearing.

In this same regard, it is also illustrative of the employer's rights that the Board was faced with the issue of whether a union steward could be suspended because he tried to prevent other employees from cooperating with management's investigation of employee misconduct. In *Manville Forest Products Corp.*,<sup>290</sup> the Board held unprotected a steward's directive to employees not to tell management what they had heard and seen, but to state that they had not seen or heard anything.<sup>291</sup> The NLRB rejected the argument that the conduct was protected because the steward did not personally refuse to cooperate but simply, in his role as union representative, advised others not to answer.<sup>292</sup> The Board, applying *Cook Paint & Varnish Co.*,<sup>293</sup> reasoned that the employer could have compelled the employees to cooperate in the investigation. According to the Board, "it is within an employer's legitimate prerogative to investigate misconduct in its plant and to do so without interference from any of its employees—including those who are union officials."<sup>294</sup> The Board made it clear that a steward cannot look

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288. 29 U.S.C. § 141-197 (1959). See M. HILL & A. SINICROPI, *supra* note 119, at 82; O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 121-36 (1991).

289. Rolligon Corp., 254 N.L.R.B. 122 (1981) (citing Endocott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)).

290. 269 N.L.R.B. 390 (1984).

291. *Id.* at 391.

292. *Id.*

293. 264 N.L.R.B. 646 (1979).

294. *Manville Forest*, 269 N.L.R.B. at 391.

to his status as a union official for protection when advising employees not to cooperate.<sup>295</sup>

## 7. Failing to Cooperate with Unions

Although beyond the scope of this Article but related to the above discussion, unions, like employers, are often confronted with individuals who refuse to cooperate in internal investigations. Such was the case in *Simmons v. Local 713, Textile Workers*,<sup>296</sup> where an individual was disciplined for "non cooperation" when he refused to sign a release indicating that a polygraph test (about to be administered by the union investigating stolen election ballots) was taken voluntarily.<sup>297</sup> More commonly, individuals witness events, but for whatever reason, refuse to tell union leadership what they know or refuse to attend an arbitration hearing for fear of management reprisals. Can a labor organization fine or otherwise expel from membership in the union an individual for refusing to cooperate?

The Labor-Management Reporting and Disclosure Act of 1959, also known as the Landrum-Griffin Act,<sup>298</sup> and specifically Title I of the Act, the so-called "Bill of Rights" section, provides safeguards against improper disciplinary action against a covered union member. Section 101(a)(5) provides that "[n]o member may be fined, suspended, expelled, or otherwise disciplined . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; [and] (C) afforded a full and fair hearing."<sup>299</sup> Under Taft-Hartley, a union commits an unfair

295. *Id.*

296. 350 F.2d 1012 (4th Cir. 1965).

297. *Id.*

298. 29 U.S.C. §§ 401-531 (1959).

299. *Id.* § 401. The following decisions relate the interpretive history of the section: *Amalgamated Transit Union, No. 825*, 240 N.L.R.B. 1267 (1979) (extending *Cannery* protection to employee who made statement adverse to co-worker's position during pendency of grievance); *Cannery Warehousemen, Local No. 788*, 190 N.L.R.B. 24, 27 (1971) ("It is essential to the existence of the arbitration process that witnesses testify before the arbitrator without fear of reprisal from either the employer or the union."); *Accord Oil Workers Local No. 7-103*, 269 N.L.R.B. 129, 130 (1984), where two union employees signed statements alleging that another employee had violated certain plant rules and were promptly fined by the union with "engaging in conduct detrimental to the welfare and interests of the membership." The Board, phrasing the issue as "whether [the union] by fining [the two employees] for alleged violations of the Union rules, violated Section 8(b)(1)(A)," held that "in cases where a union has fined members for appearing and testifying in arbitration proceedings in a manner contrary to the interest of other members" the union violated the Act. *Id.* at 132. See also *United Mine Workers of America, Local 1058*, 299 N.L.R.B. 47, 49 (1990)

labor practice by fining or otherwise disciplining an individual who testifies in favor of management.<sup>300</sup> If refusing to appear at an arbitration hearing is similar to testifying at the hearing itself and is accordingly protected under the NLRA, then a union will be without power to discipline an employee for engaging in that activity. If unprotected, a union may arguably assess a fine or other discipline against a member pursuant to a union rule or constitution, although under current law a union may discipline its members for offenses that are not enumerated in its constitution.<sup>301</sup> The better view is that unions, like employers, can subpoena an employee to testify and will not have the authority to fine recalcitrant employees.

#### IV. CONCLUSION AND POLICY IMPLICATIONS

What should be the rule both in the public and private sector when an employee "takes the fifth" or otherwise refuses to supply management with information concerning an internal investigation?

As indicated, the law in the public sector amounts to this: when a public employee is not provided with use immunity, his statements cannot be used against him unless the statements are voluntarily given. Any threats or actual discipline against the employee who declares that he is invoking the fifth amendment is unconstitutional unless immunity is granted. A public employee granted immunity who refuses to answer questions specifically, directly, and narrowly related to his official duties may be dismissed. Further, a public employee may be dismissed when his answers call for dismissal. Finally, if an affirmative assurance of immunity is not forthcoming from the state's attorney, it should be given by a non-bargaining-unit supervisor-employer rather than a co-member of the bargaining unit, even though the latter is a bona fide "supervisor" with corresponding supervisory authority.

The "rules" are different (and more simple) for private-sector management. Most arbitrators correctly hold that the constitutional protections between the individual and the state are not operative in the private sector.

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(Intra-union charges against a union member were filed because the member testified on behalf of his employer and against another union member at an arbitration hearing. The Board stated: "the point is that a union may not discipline or even try a union member for the member's participation in the grievance/arbitration process." *Id.* Such an action, according to the Board, restrained and coerced the employee's section 7 rights. *Id.*); Freight Drivers & Helpers Local No. 577, 218 N.L.R.B. 1117 (1975) (finding violation of Act where union held disciplinary hearing regarding testimony against union steward at arbitration hearing).

300. 29 U.S.C. § 411(a)(5) (1947).

301. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 244-45 (1971) (it is "a futile exercise for a court to construe the [union's] written rules in order to determine whether particular conduct falls within or without their scope.").  
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There are some arbitrators who still have it wrong,<sup>302</sup> but they are in the minority and their views and logic are suspect. In deciding cases arbitrators may consider all relevant factors, including, as Professor Meltzer has observed, "those values embodied in statutes and the Constitution—values that help shape standards of justice not only in the plant, but also in the larger community."<sup>303</sup> But arbitrators should not conclude that private-sector employees are somehow protected by the fifth amendment in their dealings with management. The analogy to constitutional rights may sometimes be useful, but as stated by one arbitrator, "it is limited and those rights cannot be applied unqualifiedly to industrial disputes."<sup>304</sup>

With respect to justifying the holdings by private-sector arbitrators, an argument can be made that an employee should elect "who he wants to work for" and what he is attempting to maximize. If he is afraid of the "wolves and giants" in the woods<sup>305</sup> (i.e., if he is a "risk-averter"), then he should remain

302. See, e.g., the decision of Arbitrator Joseph Baird in King Co., 89 Lab. Arb. (BNA) 681 (1987) (Baird, Arb.), where he declares: "There can be no doubt whatsoever that to use the threat of termination or suspension to seek a confession of criminal conduct clearly impinges upon the Fifth Amendment rights of the grievants." *Id.* at 685. See also Temtex Products, Inc., 75 Lab. Arb. (BNA) 233, 237 (1980) (Rimer, Arb.) (Holding that an order to submit to a polygraph test was analogous to refusing to follow instructions that would place the employee in imminent danger to his health and safety, and that "it exposes the employee to another sort of danger, that of self-incrimination, by forcing the revelation of information which may be placed in the hands of the employer to his future detriment, whether accurate or not, and whether or not material to the investigation at hand.").

303. Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724, 728 (1976) (cited in General Plant & Chemical Co., 80 Lab. Arb. (BNA) 413, 415 (1983) (Kossoff, Arb.) (holding that management had right to introduce metal detector and random inspection procedures at plant, stating that the "Fourth Amendment grants the individual a right of privacy vis a vis the federal government . . .").

304. Orthodox Jewish Home for the Aged, 91 Lab. Arb. (BNA) 810, 815 (1988) (Sergent, Arb.).

305. Cf. Though it's dark,  
There are always wolves,  
There are always beans  
or a Giant dwells there.

So it's  
Into the woods  
you go again,  
You have to  
Every now and then.

silent (perhaps even taking the fifth) and not cooperate in the employer's investigation of wrongdoing. Management, however, should not be forced to carry such an employee on its payroll. Termination accordingly may be appropriate, at least in the case where the employer can demonstrate a *bona fide* need for the information, and the misconduct investigated is the subject of a plant rule, or alternatively, the employee has been forewarned of the employer's concern. Employees have every right to protect themselves from criminal charges by invoking the fifth amendment, but they should not expect job tenure when they refuse to cooperate in their employers' legitimate investigation. As well put by one arbitrator, "the grievant had a right to make himself 200 percent secure against criminal involvement, but he cannot simultaneously protect his rights to future employment when his position frustrated the legitimate right and interest of the Company [to investigate a theft]."306

The fact that the employee is a public-sector employee, and as such, enjoys a constitutional umbrella relative to his private-sector counterpart, may be fortuitous. The *Garrity*, *Gardner*, and *Lefkowitz* decisions, however, would seem to mandate that an arbitrator operating in the public sector at the very least takes into consideration the constitutional rights of employees who "take the fifth" during an investigation.<sup>307</sup> Like the courts, we see no infirmity when an arbitrator "looks to the law" for guidance and resolves any doubt in favor of the public-sector grievant.<sup>308</sup>

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But not too fast  
Or what you wish  
You lose at last.

*Into The Woods*, music and lyrics by Stephen Sondheim.

306. *Simonize Co.*, 44 Lab. Arb. (BNA) 658, 663-64 (1964) (McGury, Arb.).

307. *See, e.g., Regional Transp. Dist.*, 94 Lab. Arb. (BNA) 117, 123-24 (1989) (Hogler, Arb.) ("[b]y virtue of the Company's status as a public employer, its employees are covered under the Fourth Amendment to the U.S. Constitution . . ."); *City of Omaha & The Omaha City Employees*, Local 251, No. 90-00359 (Lab. Arb. 1990) (LEXIS, Genfed library) (reinstating employee discharged for refusing to be interviewed in employer's investigation of homicide, applying *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1978), and holding that management did not grant grievant immunity from criminal prosecution).

308. Frequently, either at the parties' request or even on his own motion, an arbitrator will fashion a remedy consistent with or patterned after external law. Indeed, in the federal sector, remedies must conform to the mandates of law and agency regulations. *Cornelius v. Nutt*, 472 U.S. 648 (1985) (holding that federal-sector arbitrators are required to follow the "harmful error" rule contained in 5 U.S.C. § 7701(c)(2)(A) (1988)).

The obligation and authority of a labor arbitrator to interpret and apply the law when resolving grievances has been the subject of much discussion and litigation, both in the legal and arbitral forum. See generally A. COX, *The Place of Law in Labor Arbitration, The Profession of Labor Arbitration*, in *SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1948-54*, at 76 (1957); R. HOWLETT, *supra* note 64, at 67; B. MELTZER, *Ruminations About Ideology, Law, and Labor Arbitration*, in *THE ARBITRATOR, THE NLRB, AND THE COURTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1* (1967); R. MITTENHALL, *The Role of Law in Arbitration*, in *DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42* (1968); M. SOVERN, *When Should Arbitrators Follow Federal Law?* in *ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS, PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 29* (1970). Two situations are to be distinguished. In the first situation, the contractual and statutory standards are not in conflict, but overlap. In this case, few argue that arbitrators should ignore external law when a contractual provision is ambiguous and can be interpreted in two ways—one consistent with the law and one inconsistent therewith. The second, and more difficult, situation involves the case where a conflict exists between the agreement and a statute. The orthodox position is that an arbitrator's decision is constrained by the collective bargaining agreement, and when there is conflict the arbitrator should respect the agreement and ignore the law. A contrary position argues that "arbitrators should render decisions on the issues before them based on both contract language and law." R. HOWLETT, *supra* note 64, at 83.

This position is based on the following considerations: (1) The rationale that "each contract includes all applicable law, which becomes part of the essence of the collective bargaining agreement to which Justice Douglas has referred in the *Enterprise Wheel* decision; (2) the policy of the NLRB, first enunciated in *Spielberg*, favoring the arbitral determination of legal issues, and (3) the notion that "an arbitrator who decides a dispute without consideration of legal issues disserves his management-union clients." *Id.*

Several commentators have proposed solutions somewhere between the Meltzer and Howlett positions. Archibald Cox has argued that an arbitrator should look to the statutes in order to avoid rendering an award that would require the parties to violate the law. A. COX, *supra*, at 78-79. Cox states that this position does not suggest that an arbitrator should pass upon all the parties' legal rights and obligations, nor does it suggest that an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it. Moreover, it does not imply that an arbitrator should be guided by judge-made rules of evidence or contract interpretation. According to Cox, the principle "requires only that the arbitrator look to see whether sustaining the grievances would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance." *Id.*

Arbitrator Richard Mittenhall, asserting that, on balance, the relevant considerations support Cox's view, nevertheless refined Cox's position by stating that the arbitrator should "look to see whether sustaining the grievance would require conduct

Still, the arbitrator must make it clear that his award is based on the parties' labor agreement, and not what the law may require. To do otherwise may result in having the award overturned.<sup>309</sup>

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the law forbids or would enforce an illegal contact; if so, the arbitrator should not sustain the grievance." R. MITTENTHAL, *supra*, at 50. This principle, however, should be carefully limited. It does not suggest that "an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it." *Id.* Thus, although the arbitrator's award may permit conduct forbidden by law but sanctioned by contract, it should not require conduct forbidden by law even though sanctioned by contract.

Michael Sovern offers a more detailed compromise to the debate, listing the following criteria which should be satisfied before an arbitrator entertains a legal issue:

1. The arbitrator is qualified.
2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
4. The courts lack primary jurisdiction to adjudicate the questions of law.

M. SOVERN, *supra*, at 38.

Similar to Sovern, Scheinholtz and Miscimarra argue that it is not instructive to ask whether arbitrators should or shouldn't consider statutory issues. Rather, if arbitration is to be preserved as a practical, expeditious, and final method of dispute resolution under the parties' labor agreement, the more helpful query is "whether and under what circumstances is the consideration of statutory issues appropriate." Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 ARB. J. 55 (1985). Scheinholtz and Miscimarra note that it is impossible to formulate a single answer to the question of whether statutory issues should be considered by an arbitrator. The authors maintain that four "guiding principles" should be considered when determining whether an arbitrator should consider external law: (1) the authority of the arbitrator (whether the parties explicitly indicate in their labor agreement that an arbitrator cannot consider issues of external law); (2) arbitral expertise (is the arbitrator competent to resolve the statutory issue?); (3) arbitration hearing procedures (will the parties' procedure enable a fair resolution of the issue?); and (4) the finality or "nonredundancy" of the procedure (does an arbitrator ever perform a service by handing down an award from its inception is predestined not to be enforced?). *Id.* at 55-57. Consideration of statutory issues will vary depending on a balancing of these factors.

309. In *Roadmaster Corp. v. Production & Maintenance Employees' Local 504*, 851 F.2d 886 (7th Cir. 1988), the Seventh Circuit made it clear that an arbitrator's authority derives from the parties' contract, and that an arbitrator is not to stray from his obligation to interpret the labor agreement. Because Roadmaster breached section 8(d)(2) of the National Labor Relations Act (NLRA), the arbitrator concluded that the employer's letter to the union was insufficient notice under the applicable contract to terminate the current labor agreement. *Id.* at 888 (citing *Alexander v. Gardner-Denver* Published by University of Missouri School of Law Scholarship Repository, 1991

Because of privacy considerations, employees who refuse to participate in an investigation calling for a drug or polygraph examination appear to enjoy a different status in the arbitral community. Arbitrators have concluded that talking to management about a theft is different from providing the company with a urine sample or being wired to a machine. Accordingly, employers intent on sustaining discipline or discharge for refusing these tests should 1) negotiate that right in the collective bargaining agreement, or 2) formulate a plant rule calling for testing upon reasonable suspicion that the employee is under the influence, or in the case of polygraph testing, is involved in a work-related misconduct.

In a well-reasoned opinion permitting management to use a polygraph as part of an investigation of an assault and robbery, Arbitrator Stanley Sergent reasoned that the appropriateness of the intrusion of the employee's privacy cannot be determined in the abstract:

Instead, a careful balancing must be made of such factors as the seriousness of one's conduct being investigated, its relevance to the employee's fitness to work and the Employer's consequent interest in investigating it, and the

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Co., 415 U.S. 36 (1974)). In *Alexander*, the court observed [h]is [the arbitrator's] source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the industrial common law of the shop and the various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:*

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

*Id.* at 888-89 (emphasis added) (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

The *Alexander* court further stated "*If an arbitral decision is based solely upon the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of the submission, and the award will not be enforced.*" *Id.* at 889 (emphasis added).

In no uncertain terms, the Seventh Circuit stated that is "plainly wrong" for an arbitrator to base a decision upon his view of the requirements of enacted legislation. *Roadmaster*, 851 F.2d at 889. With regard to applying law, the court stated that: "Arbitrators should restrict their considerations to the contract, even if such a decision conflicts with federal statutory law." *Id.* The court accordingly set aside the arbitration

award

reasonableness of the Employer's focus of suspicion on the employee who is asked to submit to examination.<sup>310</sup>

We submit that arbitrators, in all duty-to-cooperate cases, apply a similar balancing test that takes into account the criteria outlined by *Sergent*. Our argument is that a careful analysis of the competing factors will result in recognition of an employee's obligation to truthfully provide management with information independent of any constitutional infirmities. Management should insist that employees truthfully state what they know of work-related misconduct as a condition of future employment. Recognition of an employee's right to stand silent should be forthcoming only in those situations where the questions do not relate to the performance of the employee's official duties. A presumption ought to operate in favor of disclosure. Absent clear and convincing evidence that silence is warranted, arbitrators should give due consideration to management's legitimate need for information.

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310. *Orthodox Jewish Home for the Aged*, 91 Lab. Arb. (BNA) 810, 816 (1988)

(*Sergent, Arb.*)

