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Steven Mark Bierig
Katten, Muchin & Zavis

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Discipline for Off-Duty Conduct: Can (And If So, When Should) Big Brother Watch?

By:Steven Mark Bierig

I. THE QUESTION OF NEXUS WITH THE WORKPLACE

A. Introduction

An age-old question that labor lawyers and human resource professionals have confronted is whether an employer may take action against an employee for what he does away from work. This article will attempt to answer that question. What you will find is that while arbitrators have attempted to put some order to this confusing topic, it remains a perplexing area.

Arbitrators have traditionally held that an employer has no right to discipline its employees for any conduct (or misconduct) which occurs outside of the workplace during hours when the employee is not required to be at work. This is based upon the understanding that employees' non-work time is their own and that they may do as they pleases while on their own time. Arbitrator Harry Schulman has explained:

> We can start with the basic premise that the Company is not entitled to use its disciplinary power for the purpose of regulating the lives and conduct of its employees outside of their employment relationship... What the employee does outside the plant and after working hours is normally no concern of the employer. *If the employee commits no misconduct in the plant or during his working hours he is not subject to disciplinary penalty, though he may beat his wife, spend his money foolishly or otherwise behave like a undesirable citizen.*[1]

Thus, the general rule sets forth a clear cut standard which distinguishes work time from non-work time. However, over time, arbitrators have recognized a limited number of exceptions to the general rule. The exceptions arise where there is some connection or "nexus" between the off-duty conduct and its effect on the workplace. Arbitrator Louis C. Kesselman described the three major categories of exceptions which allow an employer to discipline an employee for some types of off-duty conduct:

(1) The employee has engaged in behavior which harms the company's reputation or product;
(2) The employee has engaged in behavior which renders the employee unable to perform his duties or appear at work (in which case the discharge would be based upon inefficiency or excessive absenteeism); and
(3) The employee has engaged in behavior which leads to a refusal, reluctance or inability of other employees to work with him;[2]

Arbitrators recently have recognized an additional exception to the general rule. They have held that an employer may discipline an employee where the employee's off-duty conduct has a deleterious effect on the "employer-employee relationship." This occurs where no definitive nexus can be established, but where the off-duty misconduct is "so inextricably connected with the workplace setting and supervisor-subordinate relationships, that discipline may properly be meted out."[3]

> Even though the altercation occurred away from Company premises and off Company time, the undersigned concludes that the record supports a finding that the altercation was so inexorably connected with the workplace setting and supervisor-subordinate relationships, that it properly falls within recognized exceptions to the basic rule that a company has no jurisdiction to discipline an employee for his off-duty conduct.[4]

As stated above, in order to impose discipline for off-duty misconduct, there must be some nexus between the off-duty conduct and the workplace. Without this relationship, the off-duty conduct should have no effect on employment.

The above-mentioned standard applies generally in the private sector. In the public sector, however, certain

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employees occupy a position of a "public trust," such as police and fire and education personnel. Employment in the public trust decreases the need for a strong nexus and thus makes it easier for an employer to impose discipline based on off-duty conduct.

Another way of stating the nexus test is that if *one* of the following questions are answered in the affirmative, then the off-duty misconduct *may* be punishable:

1) Has there been some injury to the employer's business?
2) Does the misconduct render the employee unable to perform his or her duties?
3) Does the misconduct lead to a refusal by other employees to work with the offender?
4) Has the alleged off-duty misconduct harmed the relationship between the employer and the employee to the extent that it is no longer an acceptable relationship?
5) Is the employee a public sector employee? If so, is it a position which occupies a position of public trust?

Each of these questions is explored below with illustrative case examples.

Steven Mark Bierig is an attorney with the Chicago law firm of Katten Muchin & Zavis. He concentrates primarily in representing employers in labor relations and employment law matters with emphasis on contract negotiations, arbitrations, injunction proceedings, union election campaigns and unfair labor practice cases. Between September 1994 and January 1996, Mr. Bierig represented the Chicago Housing Authority in its negotiation of labor agreements. Recently, Mr. Bierig co-authored the chapter on Public Employees in the IICLE publication The Labor Law Handbook, 1996. He previously served as a labor attorney and Senior Attorney Supervisor with the City of Chicago Corporation Counsel's office. He received his J.D. with High Honors from Chicago-Kent College of Law.

B. Has There Been an Injury to the Employer's Business?

Ordinarily, discipline may occur for off-duty misconduct only when there has been actual harm to the business. Harm is usually defined as *actual* business loss or damage to a company's reputation.[5] The harm must be actual and not merely speculative. For example, in *Eastern Airlines Inc.*,[6] the company discharged a flight attendant who was apprehended *in uniform* by law enforcement officers while in the act of selling marijuana to another airline employee. The flight attendant's conduct, while in the uniform constituted "conduct on or off the job which was in conflict with the company's interest" and was a flagrant violation of the company rules and regulations. Based on these facts, the arbitrator ruled that the discharge of the flight attendant was for just cause and denied the grievance.

In contrast, in *Texas Lycoming*,[7] the contract provided for random drug testing, but only prohibited illegal substances "in the workplace," while performing work "and during working hours." The grievant had tested positive, but it could not be proven that he actually was under the influence of drugs "in the workplace." The arbitrator overturned the grievant's discharge because it could not be proven that drugs were used or ingested *on-duty*.

Harm to the employer's "reputation" may also justify discipline. Damage to an employer's reputation creates embarrassment and a possible loss of business. However, determining when there is a harm to "reputation" is a much more difficult inquiry than the "actual harm" test described above. Factors reviewed include the degree of adverse publicity received as well as the position of the employer in the community. For example, in *Trailways Southeastern Lines Inc.*,[8] an employee pled guilty to charges of breaking and entering his estranged wife's house with an intent to commit murder, as well as trying to burn down another house belonging to his wife. This behavior resulted in significant negative press coverage which identified the defendant as a Trailways bus driver who had an alcohol problem. Because of this extensive press coverage, the grievant was discharged. The arbitrator upheld the discharge because of the damage to the employer's reputation:

> Grievant's conduct clearly could not help but result in damage to the reputation of the company, . . ., because of the notoriety grievant received in newspaper reports. *The very nature of grievant's job and the nature of the company business dictates that an employee must not either commit violent acts or have an alcoholic problem because the company cannot afford to lose the confidence of the public.* And to those acts and the damage resulting therefrom, add the fact that Grievant obviously was not through with drinking, or cured from his alcoholism as outlined above and there is just or sufficient cause for discharge.[9]

In *Cashton Cooperative Creamery*,[10] an employee entered a plea of *nolo contendere* to taking indecent liberties with his fourteen year old daughter. The company discharged the employee. The arbitrator upheld the discharge, noting that the conviction resulted in widespread publicity throughout the small community where the employer operated in a highly competitive industry.

Conversely, in *Iowa Public Service Company*,[11] the arbitrator overturned the discharge of an employee who had pled guilty to off-duty assault against his ex-wife and others. The arbitrator held that the discharge was not justified because the employee had little contact with the public or with the employer's customers, and the conduct was not widely publicized and did not affect the employee's relationship with his co-workers.

In *Gas Service Company*,[12] a gas company meter reader with an unblemished work record had a six year police record. His arrest record included nine traffic violations, four arrests for disturbing the peace, one for aggravated assault, one for frequenting a disorderly house and one for child abandonment. He was convicted of child abandonment. He was also the victim of three stabbings, one in 1959 and two in 1962. One of the 1962 stabbings caused him to miss work for three weeks, which led to the company's investigation. He was terminated for:

off duty....dangerous or dishonest or violent or anti-social conduct which, in the Company's judgement, makes (the offender) a bad risk for future retention or injures to the Company's *reputation* with the public or Company's employees, or in the Company's judgment, exposes the public to danger, however slight.[13]

The arbitrator held that this situation created enough of a potential for harm that the discharge was justified even though there was no actual loss. The arbitrator held:

> While it is true that an employer is without power to regulate, control or censor the private life of an employee, such immunity does not extend to a situation when off-duty activities *are of such a nature as to be inconsistent with or likely to damage the business or reputation of the employer or impair plant discipline.* This is to say that an employment relationship imposes some responsibilities upon an employee which, as has been well stated, "transcend the time and place of employment." Certainly, refraining from socially reprehensible or criminal activities is one of these responsibilities.[14]

In *Baltimore Transit Company*,[15] the company discharged a bus driver who was publicly identified as the acting grand dragon of the Ku Klux Klan. In upholding the discharge, the arbitrator indicated that there existed a clear and present danger of physical violence involving patrons and property on the driver's buses. There was a reasonable probability of an economic boycott and a threatened wildcat strike by other operators. The employee's public utterances were widely publicized and the goals of the Klan made it clear that the target of the employee's activities was more than words, but acts which threatened at least 50 percent of the company's patrons.[16]

For off-duty misconduct to be actionable, it is *best* for an employer to prove there was an *actual* economic loss to the company or an *actual* harm to its reputation. Where the damage or harm to the company is truly speculative, it is difficult, if not impossible, to uphold the discipline.

C. Does the Misconduct Render the Employee Unable to Perform His or Her Duties?

Employees who are unable to come to work obviously are unable to perform their jobs and are subject to discipline up to and including termination. The result is not changed, even though the absenteeism is caused by off-duty misconduct. In *McIneney Spring and Wire Company*,[17] Arbitrator George Roumell analyzed an employee's inability to come to work because of off-duty conduct and its implications:

> [W]hen an employee is incarcerated, a company has the right to discharge him since he is, for the period of time, unable to work. The reason a discharge is proper in such cases is not because of the crime the employee has committed, but rather it is simply that through the employee's own actions, he has made it impossible to fulfill his obligation or report to work. Therefore, in such cases, a company has "just cause" to terminate the employee since he is no benefit to the company.[18]

However, as with all rules, even this rule has exceptions. Arbitrators sometimes have accepted mitigating circumstances to avoid the imposition of this strict rule. For example, in *Metropolitan Transit Authority*,[19] a bus driver with nine years on the job and a good work record was incarcerated for about two and one-half weeks. During that time, he requested sick leave. The employer rejected this request and discharged the employee. The arbitrator reinstated the bus driver, stating that mitigating circumstances called for giving him a second chance. The arbitrator observed that the jail sentence (the first one in the employee's life) was related to the employee's inability to accept his divorce and the recent separation from his wife and was not caused by alcohol or drug abuse. The employee did not have an excessive absenteeism record, he made a sincere effort to notify his employer of the incarceration, he had a legitimate illness (depression) and his incarceration had no impact on his ability to perform his job.

Some arbitrators have gone even further and attempted to set up guidelines for specifically determining whether incarcerated employees should be discharged. In *Sperry Rand Corporation*,[20] an employee was sentenced to thirty days in jail for abusing a police officer. The employee's request for personal leave was rejected. The contract provided that an employee who was not at work more than five consecutive workdays without permission would be terminated. The arbitrator identified several factors for determining if an incarcerated employee should be discharged:

1. Whether or not confinement of an employee in jail will authorize his employer to take some sort of disciplinary action depends upon all of the circumstances, including, among other things:
   (a) The language of their contract.
   (b) The length of confinement.
   (c) The nature of the cause for the confinement; i.e., whether as the result of an arrest and inability to post bond or as the result of a sentence.
   (d) The nature of the conduct resulting in confinement, i.e., its degree of seriousness and impropriety.
   (e) The nature of the disciplinary action to be taken or which results.
   (f) The employee's previous work and disciplinary record.
   (g) The extent to which the absence affected the employee's production, etc.
   (h) The effect upon plant morale.
   (i) Whether or not the conduct occurred on plant property or during working hours.
2. Generally, the same circumstances are to be considered if the question is only one of denial of a leave of absence, but usually less "fault" on the part of the employee is required to justify denial of a leave of absence.
3. Unless the contract provides to the contrary, the simple fact of confinement, standing alone, will not justify company action.
4. As a general rule, a company may not penalize an employee for conduct off the plant premises, but an exception arises when that conduct affects the employment.[21]

In upholding the discharge, the arbitrator relied on the language in the agreement which provided that "unless a justifiable reason acceptable to the Company to justify the absence is given" the Company had the right to deny permission for leave and terminate the grievant.[22]

Thus, although the general rule is that an employee who is unavailable for work because of incarceration can be discharged simply for absenteeism, arbitrators will also balance a wide range of mitigating factors in the employee's favor against the employer's need for a stable workforce.

D. Does the Alleged Misconduct Lead to a Refusal by Other Employees to Work with the Offender?

Another situation where an employer may discipline for off-duty conduct arises where fellow employees refuse to work with an alleged offender. Even though the off-duty act may have had nothing to do with work, when co-employees refuse to work with the alleged offender, an employee can be disciplined. A good example is where the alleged crime is so bad or heinous that fellow employees refuse to work with the affected employee. Arbitrators scrutinize such claims very closely. There must be a real, and not just a perceived, refusal to work with the offender for an arbitrator to uphold the discharge.

In an often cited case, an employee pleaded guilty to sodomy and corrupting the morals of children, while a Boy Scout scoutmaster. The employer, in discharging the employee, claimed that the other employees in the plant refused to work with the employee following the conviction of his crime. In upholding the discharge, the arbitrator stated:

> Arbitrators are reluctant to sustain discharges based on off-duty conduct of employees unless a direct relationship between off-duty conduct and employment is proved. *Discretion must be exercised, lest Employers become censors of community morals.* However, where socially reprehensible conduct and employment duties and risks are substantially related, conviction for certain types of crimes may justify discharge.[23]

The arbitrator sustained the discharge because the off-duty conduct could not be kept separate from the day-to-day working environment at the plant. He indicated, "[A] business enterprise by its nature requires collaboration, accord and reasonable harmony among employees. The technical and administrative sides of an enterprise cannot function correctly if the human side of the business is disrupted with conflict."[24] Similarly, in *Lonestar Gas Company*,[25] an employee of a gas company was found guilty of incest. The arbitrator indicated that he could not reinstate the employee where there was credible testimony by the grievant's fellow workers that they could not work with him.

However, in *International Paper Company*,[26] an employee was convicted of off-duty assault and battery against his foreman. In the incident, the employee slashed his foreman with a knife in an argument over a woman in a tavern. While this was no doubt serious misconduct, the arbitrator reinstated the employee because he believed it would not disrupt plant operations by creating fear among fellow employees.[27]

As stated above, the refusal to work with the alleged offender must be real and not perceived. In a humorous, but interesting case, *Air California*,[28] an employee, upon being offered $20.00 by his co-employees, "streaked" in front of the airport baggage terminal, wearing nothing but a ski mask, t-shirt and cowboy boots. When news of the incident reached management, the employee was discharged. The company argued that the employee's actions caused other employees to refuse to work with the accused. The arbitrator overturned the discharge. He reasoned:

> [T]he company's witnesses acknowledged that none of them expressed any reluctance to work with the grievant because he had streaked; *and indeed, some had encouraged the grievant to streak.* Concededly, the grievant had not committed a lewd act, and certainly, his continued employment would not threaten the safety of the other employees. Even allowing for perhaps unexpressed opinions of disapproval on the part of some company employees, *there is no basis in the record* for finding that the grievant's conduct created an employee morale problem or in any other way hampered productivity.[29]

In order for an employer to terminate an employee for off-duty misconduct by claiming that other employees refuse to work with the employee in question, there must be an *actual proven reluctance* on the part of co-employees to work with the other employee. In addition, an arbitrator must weigh both sides' positions before simply accepting an employee's statement that he/she cannot work with the grievant.

E. Has the Alleged Off-Duty Misconduct Harmed the Relationship Between the Employer and the Employee to the Extent That It Is No Longer an Acceptable Relationship?

Off-duty misconduct may also damage the "relationship" between the employer and the employee to the point where the relationship simply cannot continue. Another way of putting this amorphous category is, "Is the misconduct incompatible with the employee/employer relationship?" This is the standard which is used when off-duty conduct for which discipline is appropriate does not fall within one of the other traditional three categories.

For example, in *Fairmont General Hospital*,[30] a hospital discharged a maid who was found guilty of shoplifting at a local department store while off-duty. Arbitrator Alfred Dybeck upheld the discharge. The hospital had experienced a recent theft problem and the grievant's shoplifting conviction created a serious doubt as to her trustworthiness as an employee. In addition, the grievant's action were admitted and were publicized.

In a recent case involving the *same* hospital, a licensed nurse pleaded guilty to off-duty shoplifting. However, in this case, Arbitrator J. Ross Hunter, Jr. reversed the discharge. Although the two cases were similar, Hunter distinguished two factors from the *Dybeck* decision. In the *Dybeck* decision, there was no con-

tention made that the misconduct was detrimental to the employer and there was no reference to rules for employee conduct. In the Hunter case, the union questioned the likelihood of harm to the employer's business, the relation of the misconduct to the grievant's job, adverse publicity and that the employer based his discharge on rules in a handbook published several years after the prior award. He held that the record contained "no proof of actual detrimental harm, or convincing proof from which detriment or harm can be readily or reasonably discerned."[31] The arbitrator converted the termination to a suspension.

In *American Airlines*,[32] an employee was convicted of shoplifting while off-duty, and *not* in uniform. The employer discharged the employee but the arbitrator reversed that decision and gave the employee a second chance. The arbitrator indicated that there was no reason to question the employee's honesty during her previous four years of employment and she should be given the benefit of the doubt. There was no publicity surrounding the incident.

In *Gould, Inc.*,[33] an employee placed a supervisor's home up for sale with an agent and then had a load of black dirt dumped in the driveway. Curiously, the arbitrator did not uphold the discharge because the employee's conduct was not vindictive in nature, but simply a "prank" that did not have an impact on the supervisor's ability to manage.

Overall, it is difficult to try to categorize this type of discipline. The arbitrator must determine whether the individual's action makes it impossible for the employer to "trust" the employee again. It is difficult, if not impossible, to say that this category has any real definition. Some arbitrators seem to use this category as a catch-all for whatever disciplines do not fit within the other categories.

II. THE PUBLIC SECTOR EMPLOYEE - AN EXCEPTION TO THE TRADITIONAL NEXUS TEST.

In general, the "nexus" test is used for both private sector and public sector employees. However, the nexus standard for upholding discipline in certain public sector cases, usually dealing with public safety and educational employees, is generally lower than that for the private sector. For these types of employees, arbitrators and courts generally show a greater sensitivity to the reputation and mission of the employer as a government entity. Thus, it is generally easier for a public employer to sustain a dismissal based on off-duty misconduct where the arbitrator recognizes that public trust is a key part of the nexus requirement in the public sector. Traditionally, this applies most frequently to police officers, firefighters and teachers.

In *City of Stamford*,[34] a police officer provided his insurance company with false information in a claim for damage to his boat. The State Board of Mediation ruled that there was just cause to terminate his employment because of his unique position as a police officer. The relationship between the employee and the employer was significant in that it involved a special situation of public trust.

Similarly, in *City of Taylor*,[35] the grievant was an auxiliary policeman assigned to the city parks. While working, he wore a police uniform and drove a city police car. While off-duty, the grievant was arrested for possession of narcotics. He admitted offering illegal drugs to a police informer, i.e., that he was a possessor and conveyor of controlled substances. In sustaining the discharge, the arbitrator held:

> The grievant was, in fact, an auxiliary member of the police force and paid for these services by the Parks and Recreation Department. Consequently, this episode reflects adversely against the reputation of the Taylor police force, if countenanced, could induce:
>
> A. shattered morale among the officers, or
>
> B. contempt for necessity to practice conferments with the laws among all City Employees.[36]

In *Polk County, Iowa*,[37] an employee who worked as a counselor in a rehabilitation program pleaded guilty to operating a motor vehicle under the influence of alcohol. As a full-time counselor, her duties included administering breathalyzer tests and otherwise ensuring that clients had not been engaged in substance abuse. She was obligated to report an infraction should it occur. In upholding the suspension of the grievant, the arbitrator elaborated on the relationship between the conduct and the mission of her public employer:

> With those employees involved in law enforcement activities, the interest of the employer is particularly great in holding forth the image of employing law-abiding personnel and most such employers have specific rules with respect to off-duty conduct.
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> * * * *
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> *The rule of the Department of Corrections which requires employees to refrain from conduct incompatible with their employment and to avoid willful violation of the law or risk discipline is reasonable, considering its mission.* Having administered breathalyzer tests, grievant was in a better than usual position to know what effects are produced by given quantities of alcohol and should have known when she entered the car that her condition should not have permitted her to operate a vehicle. It cannot be said that the conduct lacked any element of willfulness. The county's discipline in this case was not without cause. . . .[38]

In *North Haven Board of Education*,[39] an employee lost his job for giving a female student a ride in his car.[40] In upholding the discharge, the arbitrators held educational employees to a higher standard than employees in the private sector:

> Due to the sensitive nature of the school-student relationship, its employees must maintain an aura of respect about themselves. They must be above suspicion and guard themselves particularly against being involved in an unfavorable student contact.[41]

In *City of Flint, Michigan*,[42] two firefighters were arrested for off-duty gambling. The city based its disciplinary action on a lower level of nexus for public safety employees:

> Citizens must have confidence in the integrity and honesty of firefighters. Firemen have access to property and valuables in the course

> of their work. Any acts which try to lower the image of the department can expose firemen to charges of minor thefts from buildings in fire situations... Firemen are expected to be law abiding citizens and their involvement in acts punishable by law hurts the good name of the department.[43]

However, certain off-duty misconduct of public safety officers is beyond the reach of discipline. While the general standard may be lowered for these specific groups of employees, there still must be an actual connection between the conduct of the employee and the mission of the employer. For example, in *State of Ohio*,[44] a state highway patrol officer was disciplined for failing to make timely payments on a cellular phone and a car. His problems were not advertised in the newspapers or known to the general public. The arbitrator overturned the suspension, holding that it involved completely off-duty conduct which did not affect his status as a patrol officer. He observed: "[T]here must be a realization that every private activity of the troopers are [sic] not subject to discipline unless there is an embarrassment to the employer. . . ."[45]

In public sector non-safety employment, the nexus requirement is similar, if not identical, to the private sector. Perhaps the most notorious case regarding off-duty misconduct by public sector employees was *U.S. Internal Revenue Service*.[46] Two IRS employees, after consuming alcohol, "mooned" a number of females in a parking lot. The incident was reported to IRS authorities, and both employees received three-day suspensions, even though charges were not pressed by either of the witnesses. In sustaining the grievance, Arbitrator Sam Edes set forth what is considered by many to be the standard for off-duty misconduct for public employees:

> [T]he applicable standard to be applied in judging the conduct of employees in public service takes into realistic account the fallible nature of the human condition which results, with substantial frequency, in conduct which is less than exemplary by commandment of both moral and legal codes. It recognizes, quite properly, that however much an employer may be wont to enforce such codes and condemn their transgression, *he is entitled to do so only to the degree that there is a direct and demonstrable relationship between the illicit conduct and the performance of the employee's job or the job of others.* The consequences of all other conduct is to be left for correction or punishment by civil and moral authority existing for that purpose. Such limitations have long been recognized and respect both the private and public employers.
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> * * * *
>
> [T]he conduct of the agents in this case falls far short of establishing any such necessary connection with their jobs. There can be little doubt that the concerted baring of their asses to T_____ on the night in question was conduct falling substantially short of earning them a merit badge — even a single one between them. It was a foolish and totally sophomoric display. But, while sufficiently insulting to cause T_____ to report the incident to the garage attendant, it was not of sufficient moment for her - although invited by the police to do so - to want to pursue the matter further.[47]

In *Social Security Administration*,[48] the grievant had performed her duties as a clerk typist for the Social Security Administration satisfactorily for approximately eight years. The grievant entered a plea of guilty to a sexual offense against a minor child and received a one-year suspended sentence and two years' supervised probation coupled with an order to undergo psychiatric treatment. He was subsequently convicted of the same offense a second time and received a two-year suspended sentence and supervised probation for three years. Because of the second offense, he was terminated by the Social Security Administration. In rejecting termination, the arbitrator stated:

> There must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duty satisfactorily *or some other legitimate government interest promoting the efficiency of the service.* Although in the case of certain egregious circumstances . . . the presumption of nexus may arise from the nature and gravity of the misconduct, the agency specifically states that it does not intend to rely upon any such presumption. Thus, the SSA must directly prove by a preponderance of evidence the nexus between the grievant's off-duty sexual activities and its affect upon the efficiency of the service.[49]

The arbitrator, citing the case of *Bonet v. United States Postal Service*,[50] indicated that the termination could not be upheld. He stated that for termination to be upheld, "[t]he agency must demonstrate, therefore, a relationship between this employee's misconduct and the specter that public confidence will be undermined."[51] Thus, while the crime for which the grievant was convicted was obviously significant and dramatic, the grievant's position did not rise to the same level of public trust which applies to public safety employees.

In *Wayne State University*,[52] a high level facility manager was discharged after being arrested and charged with cocaine possession. In upholding the discharge, the arbitrator cogently reiterated the rules for off-duty conduct:

> The Arbitrator sympathizes with the proposition that an employer's right to discipline should be confined to work related matters. Thus, the general rule is that an employee may be disciplined for on-the-job derelictions, including misconduct, deficit performance, and attendance failure. *The corollary is that generally speaking, the employer has no right to discipline on the basis of the employees off-duty behavior and that the employee's prior life is none of the employer's business.* However, the aforesaid approach does not apply when an employee's off-duty or off-workplace behavior affects the business or operation. The employer should bear the burden of demonstrating that away from work misconduct requires or justifies discipline.
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> * * * *

Thus, it has been said:

> The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernable. They must be such as could logically be expected to cause some result in the employer's affairs. Each must be measured on its own merits. [footnote omitted]

The Arbitrator observes that H_____ served as Facility Manager of a community center. As established in great part by union witnesses, the executive job was not low level, routine or lacking in public involvement. Instead, this is a position requiring great contact with the community, when success is based on leadership and trust attributes. The Facility Manager works with senior citizens and youth groups, and is even charged with the rehabilitation of persons convicted of crimes.[53]

Thus, what has emerged in the public sector is a two-tier standard. For employees who operate in the public safety or education arena (police, firefighters and teachers), there is a high degree of sensitivity and the nexus for upholding discipline is easier for an employer to reach. In contrast, in a public non-safety setting, the standard is very similar to the private sector.

III. CONCLUSIONS AND RECOMMENDATIONS

It is difficult, if not impossible, to fashion any "rule" which applies to off-duty conduct cases. Based on the cases, it appears that arbitrators look at the facts of the individual case.

Arbitrators generally hold that what a person does away from work is not any business of the employer, except under a limited range of circumstances. There must be some *connection* between an employee's conduct and his employer in order for the employer to take any action. The one exception to this rule involves public safety employees, who are held to a higher standard.

Should this standard be raised or lowered? It is this author's opinion that the current standard should be maintained. Arbitrators should continue to respect what an individual does on his or her own time. In addition, arbitrators should only sustain discipline when there is true nexus between the conduct and an effect on the employer. What may seem inappropriate to one employer may be accepted, even condoned by another. Arbitrators should not place themselves in a position of making moral judgments. Only if the employer is affected should discipline be imposed. But if the employer is affected, the employer may act.

Further, after practicing in the public sector for over seven years, I see the degree of public trust which police and firefighters have. Fair or not, the public holds public safety employees in an extremely high regard. That trust is a very strong bond and it should be maintained, perhaps even strengthened. Thus, any action off-duty by someone in the public trust must be reviewed carefully to determine if such behavior is actionable.

In sum, employers have enough to worry about running their business, including the business of government, on a daily basis. They should not try to expand their concerns to meet the private lives of their employees. *But*, where these two worlds collide, then, in answer to my earlier question, Big Brother can watch. ◆

Notes

1. *Ford Motor Co. & UAW - CIO*, Opinion A-132, Opinion of the Umpire (H. Shulman 1944) (emphasis added).
2. *W.E. Caldwell Co.*, 28 Lab. Arb. (BNA) 434, 436-37 (1957) (Kesselman, Arb.).
3. *Murray Machine Inc.* 75 Lab. Arb. (BNA) 284, 287 (1980) (Kerkman, Arb.).
4. *Id.*
5. *Inland Container Corp.*, 28 Lab. Arb. (BNA) 312, 314 (1951) (Ferguson, Arb.).
6. 76 Lab. Arb. (BNA) 961 (1981) (Turkus, Arb.).
7. 104 Lab. Arb. (BNA) 1043 (1995) (Duff, Arb.).
8. 81 Lab. Arb. (BNA) 712 (1983) (Gibson, Arb.).
9. *Id.* at 716 (emphasis added).
10. 61-1 Lab. Arb. (CCH) ¶8,008 (1960) (Muller, Arb.).
11. 95 Lab. Arb. (BNA) 319 (1990) (Murphy, Arb.).
12. 39 Lab. Arb. (BNA) 1025 (1962) (Granoff, Arb.).
13. *Id.* at 1026 (emphasis added).
14. *Id.* at 1028 (emphasis added).
15. 47 Lab. Arb. (BNA) 62 (1966) (Duff, Arb.).
16. *Id.* at 66.
17. 72 Lab. Arb. (BNA) 1262 (1979) (Roumell, Jr., Arb.).
18. *Id.* at 1265.
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22. *Id.* at 224.
23. *Robertshaw Controls Co.*, 64-2 Lab. Arb. Awds. (CCH) 8748 (1964) (Duff, Arb.) quoting *Chicago Pneumatic Tool Co.*, 38 Lab. Arb. (BNA) 891, 893 (1961) (Duff, Arb.) (emphasis added).
24. *Id.*
25. 56 Lab. Arb. (BNA) 1221 (1971) (Johannes, Arb.).
26. 52 Lab. Arb. (BNA) 1266 (1969) (Jenkins, Arb.).
27. *Id.* at 1266-1267.
28. 63 Lab. Arb. (BNA) 351 (1974) (Kaufman, Arb.).
29. *Id.* at 53 (emphasis added).
30. 58 Lab. Arb. (BNA) 1293 (1972) (Dybeck, Arb.).
31. *Fairmont General Hospital*, 91 Lab. Arb. (BNA) 930, 934 (1988) (Hunter, Jr., Arb.).
32. 68 Lab. Arb. (BNA) 1245 (1977) (Harkless, Arb.).
33. 76 Lab. Arb. (BNA) 1187 (1981) (Boyer, Arb.).
34. 97 Lab. Arb. (BNA) 261 (1991) (Pattocco, Arb.).
35. 65 Lab. Arb. (BNA) 147 (1975) (Keefe, Arb.).
36. *Id.* at 149.
37. 80 Lab. Arb. (BNA) 639 (1983) (Madden, Arb.).
38. *Id.* at 642 (emphasis added).
39. 59 Lab. Arb. (BNA) 99 (1972) (Purcell, McDonough, Sirabella, Arbs.).
40. It is interesting to note that the employee is only identified as a male employee. There is no inference in the case as to whether the employee was a teaching or non-teaching employee.
41. *Id.* at 100.
42. 59 Lab. Arb. (BNA) 370 (1972) (Stieber, Arb.).
43. *Id.* at 371.
44. 105 Lab. Arb. (BNA) 110 (1995) (Feldman, Arb.).
45. *Id.* at 113.
46. 77 Lab. Arb. (BNA) 19 (1981) (Edes, Arb.).
47. *Id.* at 22-23 (emphasis added).
48. 80 Lab. Arb. (BNA) 725 (1983) (Lubic, Arb.).
49. *Id.* at 728 (emphasis added, citations omitted).
50. 661 F.2d 1071 (5th Cir. 1981).
51. 80 Lab. Arb. at 729, citing *Bonet*, 661 F.2d at 1077.
52. 87 Lab. Arb. (BNA) 953 (1986) (Lipson, Arb.).
53. *Id.* at 957, citing *Inland Container Corp.*, 28 Lab. Arb. (BNA) 312, 314 (1957) (Ferguson, Arb.) (emphasis added).

RECENT DEVELOPMENTS

by the Student Editorial Board

Recent Developments is a regular feature of *The Illinois Public Employee Relations Report.* It highlights recent legal developments of interest to the public employment relations community. This issue focuses on development under the two collective bargaining statutes and Equal Employment Opportunity law.

IELRA Developments

Arbitration

In *Granite City Comm. Unit Sch. Dist. v. IELRB*, Case No. 4-95-0507 (4th Dist. April 25, 1996), the Fourth District Court of Appeals upheld the IELRB's finding that the School District violated the IELRA when it refused to arbitrate a grievance. The case arose when a school employee was shoved twice by a student who, after a parent teacher conference, was not suspended for his actions. After noticing the student in school the next day the employee demanded that the principal explain why the student had not been suspended. Unhappy with the principal's explanation the employee allegedly called the principal a "wimp." This resulted in the principal requesting that the employee go home for the remainder of the day, which she did after meeting with her Union President. The employee returned to work the next day and the District made no plans to fire her.

However, the District did initiate an administrative hearing against the employee which resulted in a one day suspension without pay, which was considered already served from the day the employee was originally asked to leave work. The suspension made no notice of any District policy or rule upon which it was based. After jointly agreeing to bypass the first two levels of the grievance procedure and to proceed directly to arbitration the District notified the American Arbitration Association ("AAA") that it felt that the matter was not arbitrable and that it would not abide by the award. The AAA found that an arbitrable issue did exist and established a hearing date.

The Union then filed an unfair labor practice with the IELRB charging that the District violated the IELRA by refusing to arbitrate a grievance. The ALJ found that the issue was arbitrable and found that the District had committed an unfair labor practice. The IELRB affirmed the ALJ's decision.

The District's defense to the unfair labor practice was that it would be in violation of, inconsistent with, or in conflict with another statutory provision. The District argued that it had the right to instigate removal procedures against school employees, and therefore to temporarily suspend employees, under the School Code and that the arbitrator's award would interfere with that right. The court, however, found that the temporary disciplinary suspension was not a first step in the School Code's statutorily defined manner of firing a school employee. Rather the temporary suspension in this case "is at once both a first and final decision, devoid of any connection to an overarching statutory framework." Therefore, the temporary suspension dealt out in this case was not tied to any "integral part" of the school code and the District could not rely upon its defense against the unfair labor practice.

Chicago School Reform

In *Bricklayers Local 21 v. Edgar,* 152 LRRM 2079 (N.D. Ill. 1996) the United States District Court dismissed the claim by eighteen civil service employee unions that certain sections of the Chicago School Reform Act, H.B. 206, were unconstitutional, impairments of contracts. The unions argued that the Act impaired their ability to enter into three different types of "contractual" relationships as the exclusive bargaining representative of the non-teacher employees of the Chicago Public school. These included current and future collective bargaining agreements between the unions and the Chicago Board of Education, implied civil service contracts between the unions and the Board and union constitutions and bylaws.

H.B. 206 altered the structure and powers of the Chicago public school system. The General Assembly found that an educational crisis existed in the Chicago public school system and created the Chicago School Reform Board of Trustees (Board) to bring financial and educational stability to the Chicago public school system. The General Assembly granted the Board the power to increase the quality of educational services in Chicago, develop a long-term financial plan that used available resources in the system, implement cost-saving measures in an effort to reduce excess spending, and create an efficient and effective management system in the Chicago public school system. In addition to these new powers, H.B. 206 removed the unions exclusive bargaining power with the Chicago public school district by allowing individual employees to waive contractual provisions without the union's consent.

In determining whether or not there was a violation under the Contract Clause, the court applied the following four part inquiry. First, the new legislation must involve a contractual obligation. Second, the legislation must impair the obligation. Third, the impairment must be substantial. Fourth, in order to be valid, the impairment must be "reasonable and necessary to serve an important public purpose." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). However, if there is no "contractual" relationship or the impairment is not substantial the inquiry ends and there is no Contract Clause violation.

The union contended that H.B. 206 impaired existing and future collective bargaining agreements. However, the court held that all collective bargaining agreements that the unions claimed were in effect expired on August 31, 1995. The unions countered that the expiration dates in the collective bargaining agreements did not necessarily render the dispute moot, because the

employer was still required to maintain the status quo. However, the court pointed out that not all terms and conditions of the collective bargaining agreement are subject to this doctrine and those terms that are subject to this doctrine do not have force by virtue of the contract. The unions also argued that the provisions in H.B. 206 which allowed employees to waive portions of the collective bargaining agreement without union consent violated the Contract Clause. However, the court determined that the waiver provision only applied prospectively to "any collective bargaining agreement entered into after the effective date of this amendatory Act of 1995."

The unions next asserted that the elimination of certain civil service rights impaired implied contracts, which prior to the enactment of H.B. 206 provided for continued employment absent just cause. However, the court held that the civil service rights incorporated in the contracts expired along with the other portions of the collective bargaining agreements.

Finally, the unions argued that the union constitutions and bylaws were contracts between the unions and its members for purposes of the Contract Clause and have been impaired by H.B. 206. The court assumed that union constitutions and bylaws are binding contracts for purposes of the analysis under the Contract Clause. In addition, the court found that H.B. 206 removed the unions as the employees exclusive bargaining agent in negotiating contracts concerning wages, hours and working conditions. As such, H.B. 206 undermined the unions' purpose as embodied in their constitutions and bylaws, thereby creating a substantial impairment of a contractual obligation. However, the court determined that the creation of different systems for negotiating employee contract terms with the school district was rationally related to the legitimate interest of eliminating inefficient waste in the school system. The court reasoned that the General Assembly may have been right or wrong in what it did, but it could not be found to be irrational. As such, there is no Contract Clause violation. Therefore, the impairment was justified as a reasonable means to a legitimate public purpose.

The unions also alleged that their expectations of continued employment absent just cause for discharge and their rights to contest discipline by the employer were eliminated by the new legislation without procedural due process of law. The court held that the unions clearly had property rights in the collective bargaining agreements, but those constitutionally protected property rights expired on August 31, 1995 when the collective bargaining agreements expired. In addition, the court found that the regulations contained in H.B. 206 bore a rational relationship to the legitimate governmental interest of improving the efficiency and accountability of the Chicago public schools, and therefore did not violate substantive due process rights or the equal protection rights of the unions.

Duty to Bargain

In *Mt. Vernon Educ. Assoc. v. IELRB*, 633 N.E.2d 1067 (4th Dist. 1996), the Fourth District Appellate Court affirmed the IELRB's finding that the Mt. Vernon Education Association had violated the IELRA and that the Mt. Vernon School District (District) had not violated the act when the contract negotiations reached an impasse over the contents of a "zipper clause." The court noted that "[a] zipper clause conveys the message that this agreement contains the complete understandings of the parties. It zips up and closes their negotiations and announces there is no more to bargain about till next time." The case arose out of the Association's attempt during negotiations to delete the following contract language:

> Content of Agreement . . . The parties each voluntarily and unqualifiedly waive any rights which might otherwise exist under law to negotiate over any matter during the term of this Agreement, and each agrees that the other shall not be obliged to bargain collectively during the term of the agreement. Subject matters not referred to in this Agreement or statutes applicable to matters covered by this Agreement shall not be considered as part of the Agreement and remain exclusive Board and/ or Administration prerogatives.

When negotiations stalled, the District filed an unfair labor practice charging the Association with a refusal to bargain in good faith over a mandatory subject of bargaining. The Association also filed a charge against the District for negotiating to an impasse over a permissive subject of bargaining and for refusing to sign the collective bargaining agreement. The parties reached an agreement on all other issues and signed a temporary collective bargaining agreement, that did not contain the "zipper" clause, until this dispute could be settled by the IELRB. The ALJ found that the "zipper" clause was a permissive subject of bargaining and dismissed the complaint against the Association and sustained the complaint against the District. The IELRB reversed in part and affirmed in part the ALJ's decision and appeal was taken by both the District and the Association.

The court upheld the IELRB's decision that this was a narrow zipper clause and, therefore, a mandatory subject of bargaining. The court affirmed the IELRB's decision to use the IELRA's policy and statutory language to reject other jurisdictions' findings that all zipper clauses are mandatory subjects of bargaining. *See e.g., NLRB v. Tomco Comm., Inc.*, 567 F.2d 871 (9th Cir. 1978). Instead the court deferred to the IELRB's decision to divide zipper clauses into "broad" and "narrow" categories. The IELRB held a broad zipper clause is one which requires a union to waive bargaining for the term of the contract over unanticipated matters. This broad zipper clause requires the union to waive its statutory right to midterm bargaining. Because the provision is not a wage, hour or term of condition of employment it is not a mandatory subject of bargaining. Instead because it is a waiver of a statutory right it is a permissive subject of bargaining and any broad zipper clause cannot be insisted upon until impasse. However, a narrow zipper clause, and hence a mandatory subject of bargaining, exists when the negotiated agreement constitutes the complete understanding between the

parties and this results in a waiver of bargaining during the life of the contract on matters actually negotiated.

The IELRB found that this was a "narrow" zipper clause because this zipper clause acknowledged that each side had exercised their right to bargain over known topics and had abandoned some during negotiations while also agreeing to be bound by the agreement for the life of the contract. Therefore, because it was a narrow zipper clause and, therefore a mandatory subject of bargaining, the court found that the Association had committed an unfair labor practice.

Fair Share Fees

In *Illinois Federation of Teachers v. IELRB,* 215 Ill.App.3d 710, 664 N.E.2d 107 (2nd Dist. 1996), the Second District Appellate Court affirmed the IELRB's decision that unions could not charge internal and external organizing expenses to non member fee payers. This case arose from objections filed by non-union members who claimed they had been assessed excessive fair share fees by the petitioner unions during the 1991-1992 academic year, including internal and external organizing expenses.

The IELRB's ALJ had relied on the testimony of the union officials to show that both internal and external organizing increased the unions' ability to bargain effectively, brought direct economic benefits to nonmembers and enabled the union to provide more comprehensive service to bargaining unit members. Furthermore, the ALJ concluded that it was also permissible under the Illinois Constitution to charge nonmembers for organizing.

The IELRB reversed that portion of the ALJ's recommendation that pertained to internal and external organizing expenses. The unions appealed this portion of the IELRB's order.

In analyzing whether or not the unions' internal and external organizing expenses were chargeable to nonmembers, the court used the test developed by the Supreme Court in *Ellis v. Brotherhood of Railroad, Airline and Steamship Clerks,* 466 U.S. 435 (1984). *Ellis* held that organizing was not chargeable to nonmembers. The unions argued that *Ellis* was decided under the Railway Labor Act and should not control the issue under the IELRA. However, the court cited *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991) to show that the Railway Labor Act necessarily provided some guidance in their analysis. Furthermore, the court used the test developed in *Lehnert* to affirm the conclusion of the IELRB that external organizing was not sufficiently germane to collective bargaining to be chargeable to nonmembers and that only an indirect relationship was established between internal organizing and contract administration.

IPLRA Developments

Representation Elections

In *City of Chicago and the Chicago Typographical Union No. 16 v. Kenneth Arellano,* No. L-RD-96-010 (ILLRB 1996), the Local Board upheld the Executive Director's Report and ordered the challenged ballot of a supervisor, a member of a historically recognized bargaining unit, be opened and counted in a decertification election.

In a decertification election, the incumbent union challenged the ballot of a bargaining unit member contending that he was a managerial employee and/or supervisor and was therefore not eligible to vote in the election. The incumbent union relied upon Section 9 of the Act which states that the Board may not find a unit which includes supervisors and non-supervisors as an appropriate bargaining unit. The Board stated in dicta that the appropriateness of the unit was not at issue in this case but if it was that the Act specifically provides an exception for those units which are historically recognized. Pursuant to Section 9(b) of the Act, "In cases involving an historical pattern of recognition, . . . the Board shall find the employees in the unit then represented by the union pursuant to the recognition to be the appropriate unit." As such, the Board held that the supervisor remained a member of the bargaining unit. Citing *City of Peoria v ISLRB,* 518 N.E.2d 1325, 4 PERI ¶4009 (1988), the Board held that under the Act, a supervisor included in a historical bargaining unit has the status of a public employee and thus is entitled to vote. It further stated that the legislative history and the language of the Act evidenced the intent to grant voting rights to supervisory employees since neither the Act nor the Rules make a distinction between supervisory and non-supervisory employees with regard to voting rights. The Board found that according to Section 3(s)(2) of the Act, "the critical basis for determining whether an individual is an eligible voter is the individual's status as a bargaining unit member rather than . . . the individual's status as a supervisor." The Board, accordingly held that the supervisor was eligible to vote and ordered that the ballot be opened and counted.

The incumbent union also filed objections to the election contending that the same supervisor participated in election misconduct by preparing and obtaining employee support for the decertification petition was objectionable election misconduct and thus wrongfully influenced the election. Citing the NLRB decision, *Montgomery Ward & Co.*, 115 NLRB 645 (1956), the Board held that a bargaining unit supervisor making anti-union statements prior to an election is not seen as management but is regarded as a fellow employee and therefore there is no threat of coercion, restraint or intimidation. The NLRB "has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized or ratified the supervisor's activities or acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for or on behalf of management." As there was no evidence that management encouraged the bargaining unit supervisor's conduct, the Board found it was not objectionable conduct and found that a hearing on the Incumbent Union's election objection was not warranted.

EEO Developments

O'Connor

In *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), the United States Supreme Court held that a plaintiff need not be replaced by a person outside of the protected class in order to demonstrate age discrimination.

Petitioner was 56 years old when he was terminated and the respondent replaced him with a 40 year old employee. Petitioner initiated this action claiming he was terminated in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The District Court granted respondent's motion for summary judgment holding that the petitioner failed to make out a prima facie case of age discrimination under the framework established by *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The Court of Appeals for the Fourth Circuit affirmed stating that to establish a prima facie case petitioner would have to show (1) he was a member of the protected group; (2) he was subjected to an adverse employment action; (3) at the time of the action, he was qualified and performing his job and meeting his employer's legitimate expectations; and (4) following his discharge, he was replaced by someone of comparable qualifications outside the protected class. Because the ADEA extends protection to those employees 40 years and older, the Court of Appeals held that the petitioner's successor was a member of the protected class and thus the petitioner failed to meet his burden of making out the last element of the prima facie case.

The Supreme Court, however, reversed and remanded with Justice Scalia writing for a unanimous court. The Court held that, assuming that a *McDonnell Douglas* analysis was appropriate in ADEA cases, there must be a logical connection between each element of the prima facie case and the illegal discrimination and found that the element of replacement by someone outside of the protected class failed this requirement. Looking to the language of the Act, the Court stated that the Act was to prohibit discrimination against employees because of their age and "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." Stressing that an inference of discrimination cannot be drawn based on the replacement of one employee with another younger employee, the Court held, "[b]ecause the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." ◆

FURTHER REFERENCES

(compiled by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Orzechowski, William, and Michael L. Marlow. POLITICAL PARTICIPATION, PUBLIC SECTOR LABOR UNIONS AND PUBLIC SPENDING. Government Union Review, vol. 16, no. 2, Spring 1995. 25 pp.

This study examines the manner in which public employee unions influence state and local government spending through political activity. Case studies of California, Massachusetts, and Ohio illustrate the involvement of

CHICAGO KENT

Chicago-Kent College of Law
Illinois Institute of Technology

565 West Adams Street
Chicago, Illinois 60661-3691

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unions in fiscal issues. Using data on unionization levels in state and local government by state, the authors estimate a relationship to various measures of public spending. Tables rank states by three categories of unionization with spending, wage comparisons, and employment levels. In general, public spending was around 30% higher in states that had a highly unionized state and local government sector.

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Rickert, Donna, W. Jack Duncan, and Peter M. Ginter. ANALYSIS OF AN INCENTIVE SICK LEAVE POLICY IN A PUBLIC SECTOR ORGANIZATION. Public Productivity & Management Review, vol. 19, no. 1, September 1995. 17 pp.

The authors analyze data collected from a financial incentive program to reduce absenteeism in a health department in Alabama. The program permitted employees to "sell back" one half of unused sick leave at the employee's current hourly rate each year. Data from three years previous to the establishment of the program were compared with experience during the incentive program. Patterns of sick leave use, use of alternative leave such as compensatory and vacation time, and characteristics of the employees and their jobs are analyzed. Results indicate that, although sick leave costs increased over the whole period, sick leave use decreased 4.65 hours per employee.

Zwerling, Harris L., and Terry Thomason. COLLECTIVE BARGAINING AND THE DETERMINANTS OF TEACHERS' SALARIES. Journal of Labor Research, vol. 16, no. 4, Fall 1995. 18 pp.

Collective bargaining has been shown to increase the salaries of unionized teachers and it may have an impact on the salaries of nonunion teachers as well. Data from a survey of high school teachers and administrators were analyzed in order to assess the impact of bargaining on the highest and the lowest salaries in a school. The authors found that increases in union density were associated with the highest salaries but had little effect on the lowest salaries for both union and nonunion teachers.

(Books and articles annotated in Further References are available on interlibrary loan through ILLINET by contacting your local public library or system headquarters)

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