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Public Sector Arbitration Decisions Related to Substance Abuse Discharge

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Introduction

This article reviews arbitration decisions involving discipline for substance abuse in public sector employment and provides guidelines for agencies and unions, based on the arbitrators' rationale, to develop workplace substance abuse policies. Sixteen public sector arbitration cases were analyzed to determine what factors caused the arbitrator to either sustain or deny the grievance.[1] The cases were divided into three categories: 1) discharge upheld/grievance denied, 2) conditional reinstatement, involving mitigating circumstances, with no back pay awarded and 3) discharge overturned with back pay awarded.

Public sector cases are often more complicated than those in the private sector because of statutory restrictions, civil service rules, and the need to balance the safety and security needs of the government with an individual's right to privacy. Government employees are protected by the U.S. Constitution under the fourth amendment, which prohibits unreasonable searches and seizures. Courts have held that drug testing procedures constitute search and seizure. In determining whether employers may require testing, courts have applied a balancing test weighing the government's right to conduct a drug test in order to protect public safety against the constitutional rights of individuals employed by the government.

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Nature of the Problem

Costs associated with drug abuse soared to $100 billion annually by 1990 when lower productivity, increased medical payments, absenteeism and injury rates were factored into the figure.[2] In a 1986 study titled *Drugs in the Workplace,* the National Institute on Drug Abuse found that compared to substance free coworkers, employees who abuse alcohol and drugs are three times more likely to: be late for work, claim sick leave days, or injure themselves or someone else. Also, they miss ten times as many work days, are five times more likely to file a workers' compensation claim and are one-third less productive than their coworkers.

In 1985, researchers at George Washington University surveyed 1,716 working adults to determine their past and present drug use.[3] Eighteen percent of those sampled had used marijuana within the past year and 6 percent reported cocaine use. When questioned regarding their marijuana use within the past thirty days, 16 percent of the skilled trades, 12 percent of semi-skilled and service workers and 10

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percent of laborers reported they had. Furthermore, the study found that drug use in the population of working adults was most prevalent among: 1) men, 2) those under 35 years of age, and 3) those who did not complete high school.

Many public sector employers are concerned about the growing number of employees who are addicted to drugs or alcohol. Solutions to the problem usually involve some form of drug testing which results in discharge for employees whose test results are positive. The objective is to remove the employee from immediate service. In some instances, employees are allowed to enroll in a treatment program and, if they successfully complete the program are allowed to return to work. But that is not always the case. On the other hand, arbitrators increasingly view chemical dependency as a medical illness or disease which must be dealt with in a constructive manner. Rehabilitation is the preferred method for the troubled employee, as opposed to discharge. Random testing or use of undercover agents to "trap" employees who suffer from an addiction is not viewed favorably by many arbitrators. Broad-based Employee Assistance Programs (EAP) are recommended for dealing with workplace substance abuse.

Why Discipline is Upheld

Primarily, arbitrators upheld the discharge of an employee for substance abuse when the government agency was able to meet its burden of proof (by either clear and convincing evidence or a preponderance of the evidence) that the employee was actually guilty of the charged offense, and if, under the collective bargaining agreement, there was "just cause" for discipline. In most cases, the seven tests of just cause were applied. These seven tests require the employer to 1) clearly communicate to employees and give notice that a rule exists, 2) impose rules that are reasonable, 3) investigate before administering discipline, 4) hold a fair and impartial investigation, 5) prove guilt, 6) treat all employees fairly and evenhandedly, and 7) impose a penalty that fits the seriousness of the crime. In cases where the grievance was denied, one or more of the following occurred: management conducted a full and fair investigation, rehabilitation efforts were unsuccessful, criminal misconduct was involved which impacted the employer's reputation, or the grievant violated clearly defined performance standards.

When a grievant is returned to work contingent upon meeting requirements of an EAP, arbitrators are likely to uphold discipline if conditions of reinstatement are not met. For example, when a bus driver (an admitted cocaine user) failed to report for two scheduled drug tests, as part of a rehabilitation program, she was terminated.[4] Her conditional reinstatement required her to undergo scheduled drug screens. The agency had notified her that failure to report for drug testing would result in termination. By missing her tests, she failed to follow a direct order. Discharge was upheld for "just cause."

Does successful completion in an EAP merit overturning of a discharge? In *City of Kansas City, Mo.*,[5] a firefighter, with ten years' seniority, was discharged for reporting to work under the influence of cocaine. In addition, he violated a number of other rules, such as excessive absenteeism, failure to follow proper grooming and arguing with a coworker. After his discharge, the employee voluntarily entered a rehabilitation program which he later successfully completed. At the arbitration hearing, the union argued that the grievant should be reinstated since he was no longer a drug abuser. In denying the grievance, the arbitrator agreed that the employee had successfully completed the EAP, but months after his discharge. Thus, he could not order reinstatement since, "clemency can be exercised only by an employer; such is not within the arbitrator's sphere."[6]

If agency rules are unambiguous and applied evenhandedly to all employees, an arbitrator is more likely to deny the grievance. The Washington Metropolitan Area Transit Authority had a rule providing for immediate discharge if an employee was convicted of off-duty possession of illegal drugs. The grievant in this case was arrested on an off-duty possession charge and pled guilty to the offense in court. Subsequently, his judgment was stayed and he completed requirements for a first-offender diversionary program which allowed for expungement of his criminal record. The union argued that he should be reinstated based on the stay of judgment. The arbitrator disagreed, noting that the arrest and conviction occurred and the employee was discharged for violating the agency's substance abuse rule.[7]

In another off-duty case,[8] an Ohio State Trooper was involved in an auto accident when driving to pick up a friend whose car had broken down in another state. The trooper was arrested for driving under the influence of alcohol. The collective bargaining agreement stated that "disciplinary action will not be taken against any employee for acts committed while off duty except for just cause." The state argued that a nexus existed between the off-duty misconduct and the trooper's ability to carry out his job responsibilities, since a key part of the trooper's job duties was arresting drunk drivers. The arbitrator agreed. The ". . . pivotal factor in off-duty misconduct cases is the nexus between the employee conduct and the employer's legiti-

mate interests in an effective business operation."[9] In this case, there was extensive media coverage of the event and the arrest impacted the officer's employment because co-workers were likely to be reluctant to work with him. Arbitrator Calvin William Sharpe agreed that the discharge was for "just cause."

If there is a clear substance abuse policy of which employees are aware, discipline will be upheld. A bus driver for Cleveland Board of Education[10] tested positive with a .025 blood alcohol level. The following work rule existed: "No employee required to operate a motor vehicle . . . for the Cleveland City School District . . . shall be under the slightest influence of intoxicants, narcotics, alcohol . . . . Any employee evidenced by medical test to be in violation of the above, shall be subject to immediate discharge."[11] A coworker reported grievant's breath "smelled of alcohol." Based on this allegation, the supervisor ordered him to take urine and blood tests. The union argued that there was no basis to order the employee to undergo the test and, furthermore, chain of custody procedures were not followed. Thus, there was no just cause for discharge. Disagreeing, the arbitrator stated that there was reasonable suspicion to order testing since the safety of the handicapped children he transported outweighed the remote possibility of test error.

Conditional Reinstatement

Arbitrators tend to view alcohol or chemical dependency as an illness and often allow one last chance for the grievant. Thus, they may order reinstatement, without back pay, conditioned upon successful completion of a rehabilitation program. Other "mitigating circumstances" may be involved resulting in split decisions due to procedural or substantive errors.

A grievance was sustained, in part, because the arbitrator was convinced that the employee did not understand the consequences of refusing to undergo a drug evaluation as demanded by the employer. "I am persuaded by the Grievant's argument that her reasons for resisting treatment . . . were premised on what she believed to be her rights under the employment contract, rather than as intentional insubordination."[12] The liquor store manager was discharged for insubordination when she refused to undergo alcohol assessment evaluation after co-workers reported her drinking on the job. She finally submitted her own, independently obtained evaluation, which the City rejected. The arbitrator ordered the employee to undergo alcohol assessment at one of five approved treatment centers. If treatment was required, reinstatement, without back pay, was conditioned upon successful completion of the program.

Discharge was not upheld for a Chicago Transit Authority[13] (CTA) employee who was denied access to the employer's EAP. The grievant was guilty of violating rules and operating procedures by backing up a train at excessive speeds, causing an accident. He admitted to "having had experimented with cocaine the evening before." Due to the seriousness of the charge, he was terminated. The arbitrator cited a number of mitigating circumstances for reinstating the grievant without back pay. Most importantly, other employees had access to the Employee Counseling Program (ECP) and the CTA's rejection for admittance was based on an irrational and arbitrary standard (amount of damage caused). This employee "was the type . . . that historically has been considered for the ECP."[14] The union successfully argued that this was a case of disparate treatment. Also, the fact that the grievant was a long-term employee with a good work record and no prior discipline, influenced the arbitrator to require the grievant to enter the ECP and if successfully completed, be allowed to return to employment in a non-operational capacity.

Evidence of rehabilitation efforts will often sway an arbitrator to rule in favor of a long-term employee. For example, an account clerk stenographer with fifteen years' employment was found intoxicated on the job.[15] She had been attending Alcoholics Anonymous, but had failed to attend a number of meetings. Thomas Rinaldo, the arbitrator, found that discharge was too harsh a penalty for someone attempting rehabilitation.

Conflicts arise over definitions of being under the influence. In Transit Authority of River City[16] the agency had a rule against "use, possession or under influence of drugs or alcohol . . . while on duty or on property." Another rule warned against consuming intoxicating beverages "for reasonable period of time before going on duty." An employee with a long history of alcohol abuse admitted drinking two beers a short time before reporting to work. He was ordered to undergo a drug test, which found a .05 blood alcohol level. The employer failed to notify employees that it had recently adopted a new critical alcohol blood level of .04 and no longer used the existing state criminal standard of .10 percent. Thus, under the new standard, the employee failed the test. He was terminated based on the rule prohibiting reporting to work under the influence. By relying on results of the drug test, the agency could not meet its burden of proof that the employee was "under the influence." Had the grievant been charged with violating the no drinking rule, the agency "might well have made a good case for termination in view of the employee's past record. But

that is not the case . . . presented, and the Arbitrator will not speculate on what would have been the result if it had.''[17] The agency's basis of termination was flawed. The remedy directed reinstatement, without back pay, to a position not dangerous to the public or the grievant.

In another transit case, the agency could not prove that an employee of 18 years was discharged for cause when he was involved in a bus incident where an elderly pedestrian fell from the curb.[18] After the incident, he submitted to a drug test which came back positive for marijuana. A number of mitigating circumstances were involved. First, the evidence showed that the grievant did not cause the accident—he may even have prevented one from occurring. Second, management never charged the employee with being impaired or under the influence of drugs or alcohol. Lastly, the grievant was a model employee with eighteen years' seniority. He was reinstated without back pay with the stipulation that he may be tested for drugs. If results were negative, he was to be returned to his job of bus driver. If the test were positive, he was to be afforded the opportunity of attending the EAP.

In two other transit cases, involving disparate treatment, employees were conditionally reinstated. The Cleveland Regional Transit Authority discharged a driver who tested positive for cocaine following a bus accident.[19] At issue was the drug policy's uneven enforcement. The arbitrator acknowledged that the grievant violated the drug policy, but held that discharge was too harsh a penalty. He denied back pay and conditioned reinstatement on passing a urine test and required enrollment in and successful completion of an EAP, including periodic testing. Arbitrator Samuel Nicholas, Jr., reinstated, without back pay, an employee who was denied ''one attempt at rehabilitation,'' a right afforded him based on a ''Memorandum of Understanding'' which the agency had negotiated with the union.[20] The union successfully argued that ''by denying Grievant rehabilitation, the Authority has failed to apply the policy in a fair and non-discriminatory manner.''[21] Therefore, the grievant was given one last chance.

Reinstatement With Back Pay Awarded

Prior to making awards in discharge cases involving job related substance abuse, arbitrators consider a number of factors that pertain to the specific events involved. Their decisions are based on evidence presented by both parties at the arbitration hearing and the applicable provisions of the collective bargaining agreement or agency rules. Below are decisions where the agency did not meet its burden of proof that the grievant was guilty of violating agency policy.

A rule requiring firefighters to submit to drug-screening when there is reasonable suspicion of improper drug or alcohol use can only be applied to those employees on-duty, Arbitrator David Dilts decided.[22] The City of Evanston required the grievant to submit to a drug screen as part of a return-to-work physical exam before returning from a paid leave. The collective bargaining agreement had a provision that any testing policy *not* include random drug testing. The employee tested positive for cocaine. Since discharge was based on results of an impermissible random drug screen, where there was no reasonable suspicion of improper drug use, the employee was entitled to reinstatement with back pay. However, the grievant was ordered to undergo another physical exam which did include a drug test. If he tested positive at this exam, he had to complete an in-patient drug rehabilitation program.

Another case involving drug testing resulted in reinstatement with back pay when arbitrator Edgar Jones, Jr., found the grievant was subjected to a random drug test in violation of his fourth amendment rights against unreasonable searches and seizures.[23] Agency policy required anyone involved in an accident where injury or property damage occurred to undergo a drug screen, irrespective of fault. The arbitrator viewed this ''incident-based policy'' as a random test since ''it segregates as a class those operators who get caught up circumstantially in an accident but who, upon immediate investigation at the scene by field supervisors and police, are determined not to be at fault.''[24] Here, a bus operator with 14 years of seniority was tested for drugs after being involved in an accident; a small amount of marijuana was found in his sample. Thus, the agency discharged him. The grievant argued that since his completion of a rehabilitation program over a year earlier, he remained drug free. By attending a party where others were smoking marijuana, the drug had entered his system. Therefore, he concluded that the positive test must have resulted from second-hand smoke. His story proved credible to Arbitrator Jones. In addition to finding that the agency's drug policy violated employees' constitutional rights, he determined that there was ''not a scintilla of evidence that [grievant] was impaired in any way.''[25]

Was a school district justified in discharging a teacher for immoral conduct based on his conviction of driving under the influence and later serving a jail sentence for driving without a valid license and resisting an officer? Not according to Arbitrator Warren Eagle.[26] He reasoned that there was no evidence

that the grievant was ever impaired on the job, nor that he encouraged students to use alcohol or drugs. Furthermore, no one had ever brought a complaint about the conviction to the attention of the school district. Therefore, there was no nexus between his off-duty misconduct and his employment. Grievant was not only returned to his former position, but with all back pay and benefits.

The last case involved a more serious offense. An employee with less than one year seniority was arrested by police while off-duty and charged with possessing cocaine with intent to distribute.[27] After plea bargaining, his sentence was reduced to a $5,000 fine. Proof was not at issue here. The disagreement arose over the nexus between the off-duty misconduct and the impact it would have on the employer's business. In addition, at the arbitration hearing the employer alleged that the grievant had provided drugs to a coworker. However, in the initial letter of proposed discharge, no reference was made to this use of drugs on company premises or that a nexus existed between the job and the off-duty misconduct. Arbitrator Arthur Eliot Berkeley asserted: "The criminal courts exist to deal with wrongs committed in society, and in this case, Mr. [A] was duly processed through the court system. It is wrong to punish someone twice for the same offense, first in the courts and then again in the workplace—especially when no nexus to that workplace is alleged, known or proven when the adverse action was proposed."[28] In the arbitrator's opinion, the employee was not given his "due process" when all the charges against him were not revealed in the initial letter of proposed discharge, even though they were brought out during the arbitration hearing. Furthermore, the employer failed to clearly demonstrate "the nexus between the off-duty misconduct and the efficiency of the service."[29] Grievant was reinstated with full back pay, seniority and benefits.

Collective Bargaining & Substance Abuse Policies

If defined at all, substance abuse policies are primarily part of an agency's written work rules. Until recently, most collective bargaining agreements have been silent on the issue of substance abuse. If language exists, it generally prohibits the use, or being under the influence, of alcohol or drugs on agency premises, or being involved in drug trafficking.

The 1990s will see a large increase in collective bargaining agreements that include a well-defined substance abuse policy and spell out in detail what is and is not prohibited. Minimum test result requirements, definitions for "under the influence," strictly defined procedures for discipline, last chance agreements and rehabilitative programs provided by the employer will be contractually agreed upon by both parties. In a survey[30] of 217 selected bargaining agreements covering 1,000 or more employees in five industries, including mass transit, 124 (57%) had a formalized policy of dealing with substance abuse. Of these, however, only 33 (27%) provided opportunities for rehabilitation. Testing provisions were found in 48 (39%) of the contracts that had a drug policy, but in all cases testing was required only under certain specified conditions, never at random.

The Americans With Disabilities Act, which takes effect July 26, 1992, prohibits discrimination on the basis of a disability in regard to hiring, discharge, compensation, advancement, job training and other terms of employment. A disability is defined as a physical or mental impairment that substantially limits one or more of an individual's major life activities; having a record of such impairment; or being regarded as having such an impairment. Regulations proposed by the Equal Employment Opportunity Commission clarify protection for drug-dependent employees. Employees who currently use illegal drugs or abuse alcohol are not considered disabled and, thus, are not protected employees. However, employees who have successfully completed a rehabilitation program and are currently drug or alcohol free are protected. Discharging a rehabilitated employee for violating substance abuse rules may run afoul of this new law. It could be argued that the Act's requirement for the employer to provide "reasonable accommodation" would include another chance to enter a substance abuse rehabilitation program.

Policy Development

Many workplace substance abuse policies rely heavily on drug testing. In 1990, over $340 million was spent in testing thirteen million employees.[31] A survey of 706 American corporations which have drug testing policies found that 78 percent refer employees who test positive to counseling and/or rehabilitation.[32] Testing, as part of a comprehensive workplace policy, can identify problem employees. A comprehensive substance abuse policy, however, must include supervisory training in detecting employees who abuse drugs, apply discipline uniformly to all employees and provide educational and rehabilitation services.

An effective substance abuse policy will be jointly negotiated between the agency and labor organization and included in the collective bargaining contract or a Memorandum of Understanding signed by both parties. Before the new policy goes into effect, all employees must be made aware of the policy, preferably through meetings where the policy is ex-

plained and time is set aside for questions and discussion. The objective of the policy should be to provide substance abuse intervention and testing if just cause exists. Rehabilitation should be offered to all employees who prove to have a substance abuse problem. Below is a model for creating a drug-free workplace policy.[33]

Step 1: Urine and/or blood tests will be required if employee is involved in an accident where personal injury or physical damage has occurred or employee's immediate supervisor suspects the employee is working while under the influence of drugs or alcohol. Signs of being "under the influence" include slurred speech, bloodshot eyes or unsteady gait. All supervisors will be trained in the detection of employees who are substance abusers.

Step 2: All drug tests must undergo a two-tier analysis. First, an enzymatic method (EMIT) screening test is conducted. If that proves positive, a confirmatory gas chromatography/mass spectrometry (GC/MS) analysis follows. If the second test is positive, the employee must be evaluated by the EAP and enter a rehabilitation program provided by the agency. Random testing for a period of up to one year is conducted once the employee completes the rehabilitation process. All tests should be sent to a laboratory accredited by the National Institute on Drug Abuse.

Step 3: If the employee tests positive during the one-year rehabilitation period, he/she must attend drug/alcohol counseling and follow the recommendations of the counselor before returning to work. After returning to work, the employee is further subject to random testing for another one-year period. If any time during this period a test result is positive, the employee may be terminated. This is a good example of a program that is rehabilitative rather than disciplinary in its approach to the problem of workplace substance abuse.

Conclusion

Workplace substance abuse policy must be developed with input from the corporate legal, medical and health and safety staff. Union representatives should be included in its formulation and implementation. By incorporating the policy into the collective bargaining agreement, both labor and management have an interest in seeing that it is followed. Agreements should state clearly behavior which is prohibited, disciplinary penalties for violating policy, how to access treatment programs, and rehabilitation requirements, including aftercare responsibilities (such as attending weekly counseling, Alcoholics Anonymous, and so on).

Employers who provide a comprehensive EAP are in a much better position to argue that the employee has been treated fairly and confidentially. Effective EAPs will provide employees with a confidential medical diagnosis (which includes the patient's history of drug abuse) and provide a personalized course of treatment that may include mandatory counseling or attendance at Alcoholics Anonymous and periodic follow-up testing.

Arbitrators base their decisions on whether the employer has proved "just cause" for discharging the chemically dependent employee who is guilty of violating company rules, including those related to substance abuse. Mitigating circumstances, such as a good work record or long-term seniority, are often considered when discharge is reduced to a suspension without pay. Often arbitrators will expect the employer to have allowed one last chance for rehabilitation.[34] The seven tests of just cause are usually applied. In the above cases, grievants were returned to their jobs when the agency's policy was not clearly communicated to employees (insufficient notice), disparate treatment was established or the penalty of discharge was too harsh for the crime committed.

Discharge was upheld if the employer proved there was a: 1) violation of agency rules which were clearly posted and applied evenhandedly to all employees; 2) failure to live up to the terms of a last chance agreement; and 3) nexus between the off-duty misconduct and employment. Bases for establishing a "nexus" could include 1) impaired performance; 2) unavailability for work due to illness or serving a jail sentence related to chemical dependency; 3) damage to the employer's image; 4) extremely hazardous work is involved; and 5) co-workers refuse to work with the employee.[35]

Employees who are chemically dependent have a medical problem and employers should encourage them to seek medical treatment. EAPs should be provided by the employer whenever possible. For those employees who refuse to recognize or admit they have a substance abuse problem, the threat of discharge can be a motivating force. Thus, the employer's workplace drug policy becomes an opportunity for intervention. ■

Notes

[1] We found these awards by searching Labor Arbitration Reports (BNA), Labor Arbitration Awards (CCH), Arbitration in the Schools (AAA) and Labor Arbitration in Government (AAA) since 1985.

[2] Stephen Rosenzweig, "The Corporate War on Drugs," *Industry Week*, January 21, 1991, p. 32.

[3] Royer Cook, "Drug Use Among Working Adults: Prevalence Rates and Estimation Methods," *Drugs in the Workplace: Research and Evaluation Data*, Research Monograph Series 91 (National Institute on Drug Abuse: U.S. Department of Health & Human Services), 1989, pp. 17-32.

[4] *Mass Transit Administration*, 95 LA 313 (Crable 1990).

[5] *City of Kansas City, Mo.*, 94 LA 1294 (Madden 1990).

[6] Id. at 1298.

[7] *Washington Metropolitan Area Transit Authority*, 94 LA 1172 (Garrett 1990).

[8] *State of Ohio*, 94 LA 533, (Sharpe 1990).

[9] *Id.* at 3537.

[10] *Cleveland Board of Education*, 90-1 ARB ¶ 8070 (VanPelt 1988).

[11] *Id.* at 3357.

[12] *City of Granite Falls, Minn.*, 90-1 ARB ¶ 8049 at 3246, (VerPloeg 1989).

[13] *Chicago Transit Authority*, 80 LA 663 (Meyers 1983).

[14] *Id.* at 668.

[15] *City of Buffalo, Real Estate Division*, 59 LA 334 (Rinaldo 1972).

[16] *Transit Authority of River City*, 95 LA 137 (Dworkin 1990).

[17] *Id.* at 147.

[18] *Southern California Rapid Transit Dist.*, 93 LA 20 (Christopher 1989).

[19] *Regional Transit Authority*, 94 LA 489 (Fullmer 1990).

[20] *Metropolitan Transit Authority*, 94 LA 857, (Nicholas 1990).

[21] *Id.* at 860.

[22] *City of Evanston*, 95 LA 679 (Dilts 1990). In April, 1991, the U.S. Court of Appeals for the Third Circuit ruled that a transit agency's drug and alcohol test, which was part of a return to work physical, violated the employee's fourth amendment rights. *See Bolden v. Southeastern Pennsylvania Transportation Authority*, No. 90-1435, (3d Cir. filed Apr. 1, 1991).

[23] *Southern California Rapid Transit Dist.*, 89-1 ARB ¶ 8117 (Jones 1988).

[24] *Id.* at 3588.

[25] *Id.* at 3591.

[26] *Michigan City Area School Corp.*, 89-1 ARB ¶ 8169 (Eagle 1989).

[27] *Goddard Space Flight Center, National Aeronautics and Space Administration*, 89-1 ARB ¶ 8038 (Berkeley 1988).

[28] *Id.* at 3190.

[29] *Id.* at 3188.

[30] *Alcohol and Drug Abuse Provisions in Major Collective Bargaining Agreements in Selected Industries*, Bureau of Labor Statistics, October 1990 (BLS Bulletin No. 2369). This bulletin includes examples of substance abuse contract language.

[31] Rosenzweig, "The Corporate War on Drugs," *supra* note 1.

[32] Gerard A. Marini, "Comprehensive Drug-Abuse Program Can Prove Effective in the Workplace," *Occupational Health & Safety*, Vol. 60, No. 4 (April 1991), pp. 54-59. This article includes a good overview of drug abuse in the workplace. *See also* Donald Klingner, Nancy O'Neill and Mohamed Gamal Sabet, "Drug Testing in Public Agencies: Are Personnel Directors Doing Things Right?", *Public Personnel Management*, Vol. 19, No. 4 (Winter 1990), pp. 391-397, for a discussion of the results of a survey of 300 public agencies' personnel directors relating to their drug and alcohol testing policies.

[33] This is based on the agreement between Midwest Coca-Cola and IBT Local 792. *See* John C. Cerrito, Todd A. Hendrickson and David Pletscher, "Confronting the Issue of Substance Abuse in the Workplace: When Organized Labor and Management Work Together," *Employee Responsibilities and Rights Journal*, Vol. 3, No. 4 (1990), pp. 285-290.

[34] For an overview of how arbitrators deal with rehabilitation, *see* Tia Schneider Denenberg and R. V. Denenberg, "The Arbitration of Employee Substance Abuse Rehabilitation Issues," *Arbitration Journal*, March 1991, pp. 17-33.

[35] Robert Coulson and Mitchell D. Goldberg, *Alcohol, Drugs, and Arbitration*, (AAA, 1987), p. 105.

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 developments under the two collective bargaining statutes and the First Amendment.

IPLRA Developments

Decertification Proceedings

In *Chief Judge of the Circuit Court of Cook County v. AFSCME, Council 31*, No. S-DR-91-15 (ISLRB 1991), the State Board affirmed its Executive Director's decision to block a decertification election because of an unfair labor practice charge, but remanded the case with instructions to set the decertification petition for hearing. The charge alleged that the employer violated IPLRA § 10(a)(4) by refusing to execute a tentative collective bargaining agreement. The union contended that had the employer executed the contract, it would have been in place at the time the decertification petition was filed.

The Board held the Executive Director acted within his discretion in delaying further processing of the decertification petition pending the resolution of AFSCME's unfair labor practice charge. The Board further held that the policies of the Act would better be effectuated by setting the decertification petition for hearing. The Board recognized that the decertification petition raised two legal issues which warranted resolution by a hearing officer. A question existed as to the appropriateness of the unit in

which the decertification election was sought, and whether an election which was held in a portion of the unit within the past twelve months barred the petition. Since the Board had never been confronted with an election bar issue under these circumstances, it concluded that proceeding with a hearing on the petition while the unfair labor practice charge was pending would result in the most expeditious processing of both cases.

Discrimination

In *AFSCME v. County of Cook,* No. L-CA-90-032 (ILLRB 1991), the Local Board affirmed its Hearing Officer's finding that Cook County did not violate IPLRA §§ 10(a)(1) and (2) by demoting an employee who had actively and openly participated in two union organizing drives at the Cook County Department of Public Health. The demoted employee, Stanley Gizewski, was a sanitary engineer (Grade 17) during the organizing drives. During the first drive, a manager for the CCDPH had distributed anti-union literature. During the second drive, Gizewski informed his superiors of his involvement in the union drive and Gizewski was given a copy of the CCDPH Director's memorandum regarding union activities and was told he had "better adhere to the County's policies or disciplinary action would be imposed."

As part of its ongoing personnel evaluations, management audited various positions including Gizewski's. In November 1987, this audit recommended that Gizewski's job be combined with three others as Sanitarian II in a Grade 16 pay classification. Gizewski was reclassified.

The Board found that AFSCME proved that: the employee participated in protected activity; the employer had knowledge of that participation; and the employer took action adverse to the participant. However, because the union failed to produce the anti-union literature distributed by the CCDPH manager, it was impossible to substantiate any threats of reprisal or benefits during the first union drive. Moreover, the Board also found that the manager's anti-union activity was not attributable to Cook County because the employees would not reasonably believe that the manager reflected employer policy.

The Board did hold that telling Gizewski to "adhere to county policies" was evidence of anti-union animus. However, this one incident was insufficient evidence to "establish the causal connection required to find a violation." The Board found that the individuals who performed the job audits and recommended the re-classification neither knew Gizewski personally nor had any knowledge of his union activity. Therefore, the Board concluded, the union did not establish a causal connection between the demotion and the union activity.

IELRA Developments

Arbitration

In *Rochester Community Unit School Dist. 3A v. Rochester Education Ass'n,* 7 PERI ¶ 1066 (IELRB 1991), the IELRB held that a school district employee has the right to file a civil suit without exhausting the contractual grievance procedure when asserting rights under the School Code. Further, it held that educational employees who are not agents or representatives of the Association are not among the entities who can violate IELRA § 14(b)(3).

While agreeing in principle with the School District that the employee's lawsuit concerned a matter subject to the grievance procedure, the Board stated that arbitration could not "have the effect of negating, abrogating, replacing, reducing, diminishing, or limiting in any way any employee rights, guarantees or privileges pertaining to wages, hours or other conditions of employment provided in statutes enacted by the General Assembly of Illinois." An employee may pursue statutory rights as separate and apart from those guaranteed by the collective bargaining agreement, in court. To hold otherwise would violate the employee's right's under the statute.

In *High School Dist. 155 Educ. Ass'n v. Community High School Dist. 155,* No. 90-CA-0037-C (IELRB 1991), the IELRB enforced an arbitration award which sustained a grievance over the discharge of a non-tenured teacher. In devising a remedy, the arbitrator stated he could not order reinstatement or backpay for a non-tenured teacher. Instead, he granted a monetary award equivalent to one-year's salary plus benefits to compensate for damage to professional integrity and standing.

The IELRB held that the award was within the arbitrator's power. First, the Board found the award did not provide tenure-related rights contrary to the School Code, but simply provided monetary compensation. Second, the Board stated that, unlike the Board itself, an arbitrator is not limited to make-whole relief when fashioning a remedy. The remedy here was "well within the arbitrator's broad discretion to remedy a breach of a collective bargaining agreement." Finally, the Board concluded that the award of one-year's salary did not constitute an award of punitive damages, but was simply a monetary award for damages to professional reputation. Therefore, the Board held that the arbitrator's award was binding on the District.

Preliminary Relief

In *Proviso Support Staff Council v. Proviso Township High School Dist. 209,* 7 PERI ¶ *1064 (IELRB 1991),* the IELRB authorized its general counsel

to seek a a preliminary injunction, under § 16(d), at the request of the union, to prevent the dismissal of certain employees and the subcontracting of certain work by the district pending negotiations with the union. The union filed 14(a)(5) and 14(a)(1) charges against the district for, among other things, unilaterally discharging a number of cafeteria workers and authorizing bid solicitations to subcontract the cafeteria work to an outside party. The district did not bargain with the union over the RIF or the effects thereof.

The Board noted that for injunctive relief to issue, there must be cause to believe that the Act has been violated, and an injunction must be just and proper under the circumstances of the case. The Board concluded that there was clear cause to believe the Act had been violated because the district was required to bargain with the union before making economically-motivated decisions. Although the School Code required that dismissed employees receive 60 days' notice prior to termination, the Board interpreted the district's bargaining duty as requiring that this 60-day period be taken into consideration for negotiation purposes. Thus, although the employees were not in fact terminated until 60 days after the decision, the district was required to bargain with the union before the decision was made. The Board further stated that the district was also required to bargain over the decision to subcontract the cafeteria work, yet failed to do so.

Finally, the Board determined that preliminary injunctive relief was appropriate under the circumstances. The Board reasoned that the delays inherent in the administrative process could cause irreparable harm to those employees affected by the decision. Furthermore, the union was newly-certified and had yet to complete negotiations for a first contract. Allowing the district's decision to stand pending a hearing might undermine support for the new union and irreparably damage the relationship between the union and the district. The Board further stated that the injunction should issue as a matter of public policy, because allowing the dismissal of the affected employees would frustrate the underlying purpose of the Act and the public interest in preventing labor strife.

Protected Concerted Activity

In *Schaumburg Education Ass'n v. Schaumburg Community Consolidated School Dist.*, No. 90-CA-0024-C (IELRB 1991), the IELRB held that the appropriate standard for determining whether activity is protected under the Act is that of *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975) and its progeny, under which acting on matters of "group concern" are protected. (The NLRB had overruled *Alleluia in Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984), changing its standard to require that an employee act with or on the authority of other employees.)

The IELRB found that a teacher's discussion with a superior over whether that superior would fill in an "Areas for Improvement" section on teacher evaluation forms was of group concern and therefore protected. Since Illinois Statute provides for teacher evaluations including specifications of particular strengths and weaknesses, and since the evaluation forms were mentioned in the collective agreement, a discussion involving the use of those forms was a group concern.

First Amendment

Discharge and Demotion

Two decisions by the Seventh Circuit Court of Appeals have determined whether public employers are protected by a qualified immunity for politically-motivated personnel practices toward Deputy Sheriffs and Legal Investigators. Although it applied the standard originally enunciated by the United States Supreme Court in *Branti v. Finkel*, 445 U.S. 507 (1980), the Seventh Circuit expressed serious reservations about the vagueness of the *Branti* test. In *Branti*, the Supreme Court held that a public employer enjoys immunity with respect to politically based practices only when "party affiliation is an appropriate requirement for the effective performance of the public office involved."

In *Thulen v. Bausman* and *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), lawsuits were brought by deputy sheriffs in Carroll and Kankakee counties who were fired when the incumbents for whom they had campaigned lost their bids for reelection. The Seventh Circuit held that the counties were entitled to the qualified immunity in their dismissal of deputy sheriffs because "political considerations are appropriate for determining qualifications for the position of deputy sheriff."

The court reasoned that a sheriff requires a great degree of loyalty from his deputies and entrusts the deputy with considerable leeway in policy formulation and implementation. These factors, according to the Seventh Circuit, make politics a proper criterion for hiring and firing a deputy sheriff.

A key factor for the court in granting the qualified immunity to Carroll and Kankakee Counties was the fact that prior case law had not clearly established whether political affiliation was a lawful job requirement for deputy sheriffs. The court quoted *Hughes v. Meyer*, 880 F.2d 967 (7th Cir. 1989), that "qualified immunity is designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law.'" Because the constitutional rights of deputy sheriffs

were "unsettled" at the time of their discharge, the court reasoned that sheriffs could not be charged with violating an established right of their employees.

Three weeks after granting public employers a qualified immunity to terminate deputy sheriffs, the Seventh Circuit *declined* to extend immunity in *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991), to the City of Gary's demotion of a legal investigator. James Matlock was a legal investigator in the city's Law Department and remained a political supporter of Gary's former mayor Richard Hatcher, who was defeated by Thomas Barnes in a hard-fought Democratic primary. Upon taking office, the newly-elected Mayor Barnes demoted Matlock. The city contended that Matlock was demoted because he had access to confidential information in the Law Department that might help former Mayor Hatcher in pending litigation.

The court rejected the city's claim, ruling that insufficient proof was offered to sustain the city's defense that Matlock was a confidential employee who was involved in the settlement of legal claims that had a political character. The long-term significance of Matlock lies in its application of *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), where the Supreme Court extended the *Branti* test beyond political discharges to include other employer practices such as demotions, hirings, transfers, and recalls. Matlock demonstrates the impact that *Rutan* can have in future cases involving any type of politically-motivated public employer practice.

Fair Share

In *Lehnert v. Ferris Faculty Ass'n*, 59 U.S.L.W. 4544 (1991), the U.S. Supreme Court held that the first amendment restricts fair share charges to objecting fee payers to expenditures which are germane to collective bargaining, are justified by the government's interest in promoting labor peace and do not significantly add to the burdens on free speech beyond those inherent in union security agreements. Applying this three-part test, the Court held that public sector unions may charge objectors for expenditures on collective bargaining in units other than their own and for preparations for an illegal strike, but may not charge for litigation outside the objectors' bargaining unit or for lobbying for other than contract ratification and implementation.

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Prepared by Margaret Chaplan, Librarian, Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign

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(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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