# BOPA ARBITRATOR TRAINING DAY AUGUST 31, 2021

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION AND OVERVIEW</td>
<td>10</td>
</tr>
<tr>
<td>WHAT WE WILL DISCUSS</td>
<td>10</td>
</tr>
<tr>
<td>WHAT WE WILL NOT DISCUSS</td>
<td>11</td>
</tr>
<tr>
<td>SCOPE OF ARBITRATION PRACTICE – So, how does arbitration work?</td>
<td>11</td>
</tr>
<tr>
<td>STEELWORKERS TRILOGY</td>
<td>11</td>
</tr>
<tr>
<td>BURDEN OF PROOF &amp; GENERAL PROCEDURE</td>
<td>11</td>
</tr>
<tr>
<td><strong>EVIDENTIARY ISSUES</strong></td>
<td></td>
</tr>
<tr>
<td>INTRO AND SCOPE OF TOPIC</td>
<td>13</td>
</tr>
<tr>
<td>WHY IS EVIDENCE IMPORTANT?</td>
<td>13</td>
</tr>
<tr>
<td>RELEVANCE AND MATERIALITY</td>
<td>14</td>
</tr>
<tr>
<td>DOES ALL EVIDENCE HAVE TO BE “RELEVANT” TO BE ADMITTED?</td>
<td>16</td>
</tr>
<tr>
<td>ARE AFFIDAVITS ADMISSIBLE IF THE SIGNER IS NOT PRESENT?</td>
<td>17</td>
</tr>
<tr>
<td>WHAT ABOUT STATEMENTS THAT AREN’T NOTARIZED, BUT ARE STATEMENTS MADE BY OTHERS AND OFFERED BY SOMEONE ELSE?</td>
<td>18</td>
</tr>
<tr>
<td>ASSESSING WITNESS CREDIBILITY</td>
<td>20</td>
</tr>
<tr>
<td>LAYING FOUNDATION</td>
<td>20</td>
</tr>
<tr>
<td>DOCUMENTS</td>
<td>20</td>
</tr>
<tr>
<td>WITNESS TESTIMONY</td>
<td>20</td>
</tr>
<tr>
<td>EXPERT OPINIONS</td>
<td>21</td>
</tr>
<tr>
<td>CIRCUMSTANTIAL EVIDENCE</td>
<td>23</td>
</tr>
<tr>
<td>HEARSAY</td>
<td>23</td>
</tr>
<tr>
<td>What is it and what it isn’t?</td>
<td>23</td>
</tr>
<tr>
<td>Admission of a party opponent</td>
<td>24</td>
</tr>
<tr>
<td>SOME EXCEPTIONS TO THE HEARSAY RULE</td>
<td>24</td>
</tr>
<tr>
<td>Excited utterances</td>
<td>24</td>
</tr>
<tr>
<td>Business records</td>
<td>24</td>
</tr>
<tr>
<td>General reputation re: character</td>
<td>24</td>
</tr>
<tr>
<td>PRIVILEGED TESTIMONY</td>
<td>25</td>
</tr>
<tr>
<td>Work product or attorney client privilege</td>
<td>25</td>
</tr>
<tr>
<td>Careful not to waive the privilege</td>
<td>25</td>
</tr>
<tr>
<td>Limited waivers of privilege</td>
<td>25</td>
</tr>
<tr>
<td>Settlement offers/mediation</td>
<td>26</td>
</tr>
</tbody>
</table>
DEMONSTRATION, VIDEOS AND PICTURES ................................................................. 26
  Demonstration evidence ................................................................................ 26
  Videos and pictures ...................................................................................... 26
  Graphs and charts ....................................................................................... 27

OBJECTIONS ........................................................................................................... 27
  Why object ..................................................................................................... 27
  When to object ............................................................................................. 27
  Objections to probative value ...................................................................... 28

DISCIPLINE CASES

JUST CAUSE – GENERALLY – THE 7 TESTS ........................................................... 28

SPECIFIC ALLEGATIONS

SERIOUS OFFENSES ............................................................................................ 31
  WHAT IS A “SERIOUS OFFENSE”? ? .............................................................. 31
  ARE THE CONSEQUENCES FOR OFFENSES IN THE CBA OR
  UNILATERALLY IMPLEMENTED? ................................................................. 32
  OFFENSES CONSIDERED “CARDINAL SINS” IN ONE INDUSTRY BUT
  NOT OTHERS ............................................................................................. 33
  THEFT ......................................................................................................... 34
  FRAUD AND MISREPRESENTATION .......................................................... 36
  BRADY GIGLIO ISSUES IN LAW ENFORCEMENT .................................... 37
  INTENTIONAL DESTRUCTION OF PROPERTY ........................................ 37
  DRUG AND ALCOHOL CASES ............................................................... 38
  ZERO TOLERANCE POLICIES FOR DRUG USE ....................................... 38
  SLEEPING ON THE JOB ............................................................................ 39

INSUBORDINATION .............................................................................................. 40
  INTRODUCTION .......................................................................................... 40
  THE ELEMENTS OF INSUBORDINATION .................................................. 40
  WHO IS A SUPERIOR AND AUTHORIZED TO ISSUE ORDERS TO THE
  GRIEVANT? ................................................................................................. 41
  WAS THERE AN ORDER, A SUGGESTION OR SOMETHING THE
  EMPLOYEE “OUGHT TO HAVE KNOWN?” .............................................. 41
  WAS THERE A REFUSAL OF THE ORDER? ............................................ 43
  WERE THE CONSEQUENCES OF THE REFUSAL MADE KNOWN TO
  THE EMPLOYEE? .................................................................................... 43
  IS THIS INSUBORDINATION OR A GOOD FAITH DISAGREEMENT
  ABOUT HOW TO DO THE WORK? ......................................................... 44
NLRA SECTION 7 RIGHTS – SOME CASE EXAMPLES ............63
FREE SPEECH ISSUES IN THE PUBLIC SECTOR ......................69
SOME ARBITRAL RESPONSES ...............................................71
HOW DID THE EMPLOYER GET THE INFORMATION? – FEDERAL
STATUTES PROTECTING PRIVATE CONVERSATIONS ........76
EVIDENCE ISSUES – ARE THESE COMMUNICATIONS EXCLUDED
FROM ARBITRATION? WAS THERE SOME SORT OF EXPECTATION
OF PRIVACY? ..............................................................................78
DID THE MESSAGE VIOLATE ANOTHER POLICY – THREATS,
DIVULGING CONFIDENTIAL INFORMATION? ......................79
IS IT THE MEDIUM OR THE MESSAGE? ..............................80
MARIJUANA RELATED ISSUES .............................................80
WHEN IS TESTING PERMISSIBLE? .....................................81
REASONABLE SUSPICION TESTING .................................82
RANDOM TESTING ...............................................................82
WHAT IS “IMPAIRED” FOR MARIJUANA USE? ...................83
ZERO TOLERANCE POLICIES .............................................85
WHAT ABOUT OFF DUTY CONDUCT IN USING OR SELLING ILLEGAL
DRUGS? ..................................................................................85
DOES A POSITIVE TEST ALWAYS = JUST CAUSE?  ALSO, DOES
HAVING A MEDICAL CARD ALWAYS EXONERATE THE EMPLOYEE?
SOME ARBITRAL RESPONSES ...............................................87
A FEW CASES WHERE HAVING THE CARD MAY WELL HAVE BEEN A
SIGNIFICANT FACTOR IN OVERTURNING DISCIPLINE BASED ON A
POSITIVE TEST .................................................................91
Public policy .............................................................................95
Second hand smoke? Maybe, but conditions have to be extreme ....95
Some efforts to rebut a positive test - not always successful ..........95
What if marijuana is found mixed in with other drugs? .............96
OFF-DUTY CONDUCT .............................................................96
GENERAL PRINCIPLE ..........................................................96
TYPES OF CONDUCT MEETING THE NEXUS STANDARD ....97
DOES THE CBA HAVE A LIST OF OFF-DUTY CONDUCT THAT
RESULTS IN DISCIPLINE? .....................................................98
CONDUCT THAT DIRECTLY HARMS THE
EMPLOYER’S BUSINESS ......................................................98
CONDUCT THAT ADEVERSELY AFFECTS THE ABILITY TO DO THE
JOB ..........................................................................................99
EMPLOYEES REFUSE TO WORK WITH THE GRIEVANT ......99
ASSAULTS IN GENERAL .............................................................. 100
ASSAULTS OR THREATS TO CO-WORKERS............................ 101
OFF-DUTY HARASSMENT .......................................................... 102
CONDUCT THAT HARMs THE EMPLOYER’S REPUTATION 
OR IMAGE............................................................................. 102
  CRIMINAL MATTERS.......................................................... 103
  DRUG OFFENSES .............................................................. 104
  DRIVING OFFENSES .......................................................... 105
LEGAL CONDUCT AWAY FROM WORK BUT WHICH OFFENDS THE 
EMPLOYER OR IS SEEN AS DISLOYAL..................................... 105
  WORKING FOR A COMPETITOR.................................................. 105
  DIVULGING SENSITIVE INFORMATION ABOUT THE ER OR ITS 
  PRODUCT.............................................................................. 105
  DISPARAGING THE EMPLOYER, MANAGEMENT OR THE 
  PRODUCT............................................................................. 106
  CONDUCT THE EMPLOYER JUST DOESN’T LIKE ..... 107
DEFENSES TO DISCIPLINE .......................................................... 107
  DISCIPLINE - BURDON OF PROOF ............................................. 107
  THE 7 TESTS AND POSSIBLE DEFENSES.................................. 107
  DISPARATE TREATMENT ............................................................ 109
  LAX ENFORCEMENT................................................................. 109
  POOR INVESTIGATIONS............................................................. 110
  DOUBLE JEOPARDY .................................................................. 110
DEFENSES WHERE THE VIOLATION HAS BEEN SHOWN
  Length of service ................................................................. 110
  Prior record ........................................................................... 111
  Good work performance and positive reviews ...................... 111
CONTRACTUAL DUE PROCESS REQUIREMENTS ................ 111
CONTRACTUAL PRE-REQ’S FOR CERTAIN DISCIPLINE .... 111
DUE PROCESS ISSUES ................................................................. 112
WITNESS STATEMENTS AND DOCUMENTS ...................... 112
WEINGARTEN............................................................................. 113
GARRITY.................................................................................... 114
LOUDERMILL ............................................................................. 115
THE “TROUBLED” EMPLOYEE .................................................. 115
MANAGEMENT ALSO AT FAULT.................................................. 117
CONTRACT INTERPRETATION AND PAST PRACTICE ISSUES

CONTRACT INTERPRETATION .......................................................................................................................... 118
    PRIME DIRECTIVE – THE INTENT OF THE PARTIES ............................................................................... 118
    RESERVED RIGHTS THEORY .................................................................................................................. 118
    IMPLIED OBLIGATIONS THEORY ............................................................................................................. 119
    IS THERE A CONTRACT AT ALL? MUTUAL ASSENT ........................................................................... 119

STANDARDS FOR INTERPRETING CONTRACTS – OBJECTIVE VERSUS SUBJECTIVE APPROACHES ................................................................. 121

PLAIN MEANING – WHATEVER THAT IS ......................................................................................................... 122

PAROL EVIDENCE RULE .................................................................................................................................. 123

BARGAINING HISTORY ...................................................................................................................................... 124

RULES TO AID INTERPRETATION AND MEANING ....................................................................................... 125
    What do the clauses modify? .......................................................................................................................... 125
    Giving words their “normal” or a “technical” meaning ............................................................................... 126
    Are the meanings consistent throughout the contract? ........................................................................... 126
    Prior Settlements ......................................................................................................................................... 127
    Prior arbitration awards ............................................................................................................................... 127
    CBA language must mean something.......................................................................................................... 128
    Expresio exclusion rule - Specifically listing one thing or a set of things excludes others ......................... 129
    Ejusdem generis – of the same kind ............................................................................................................. 129
    Noscfitur sociis – known by association .................................................................................................... 129
    Construing disputed language against the drafter .................................................................................... 129
    Avoidance of harsh or absurd results or which is contrary to law ............................................................ 130
    Specific versus general language ................................................................................................................ 130
    Avoidance of a forfeiture ............................................................................................................................. 130

MANAGEMENT RIGHTS .................................................................................................................................. 132
    DO YOU REALLY NEED THEM? ................................................................................................................. 133
    OPERATION METHODS .............................................................................................................................. 134
    WAGE CHANGES ......................................................................................................................................... 134
    PRODUCTION STANDARDS ....................................................................................................................... 134
    QUALITY STANDARDS ............................................................................................................................... 134
    TECHNOLOGICAL CHANGES .................................................................................................................... 134
    COMBING JOBS, TRANSFERS AND JOB ELIMINATIONS ........................................................................ 135
    HIRING .......................................................................................................................................................... 136
ARBITRABILITY - PROCEDURAL AND SUBSTANTIVE............................................. 155

TIMELINESS AND PROCEDURAL ARBITRABILITY .......... 155

Time deadlines – miss the time and your “dead” – that’s why they call
them that .................................................................................................................. 155

When does the time start? .............................................................. 156

When does the time end? .............................................................. 157

What if the failure to file on time is a human mistake? ........ 157

What does the grievance have to look like and where does it have to be
filed? .......................................................................................................................... 157

What are the contractual consequences for missing the time deadline?
................................................................................................................................. 158

Prospective events ......................................................................................... 158

Waiver of timeliness defense ............................................................ 159

What if the employer is late getting a response to a grievance or is
untimely in some way? .............................................................................................. 160

Equitable estoppel as it may relate to timeliness issues .......... 160

What if the grievant is unable due to disability to understand what
happened to him/her? ............................................................................................... 161

Continuing grievances ......................................................................................... 161

SUBSTANTIVE ARBITRABILITY ISSUES:

LAST CHANCE AGREEMENTS – OR OTHER DOCUMENTS SPECIFICALLY
LIMITING ARBITRAL JURISDICTION ............................................................... 163

SUBSTANTIVE ARBITRABILITY – A VERY QUICK LOOK ................

MANAGEMENT RIGHTS ....................................................................................... 164

ADDING A NEW CLAIM THAT WAS NOT PART OF THE ORIGINAL
GRIEVANCE ............................................................................................................. 165

DOES THE ARBITRATOR EVEN HAVE THE POWER TO GRANT THE REMEDY
SOUGHT IN THE GRIEVANCE? ........................................................................... 166

IS IT A MATTER FOR NEGOTIATION? .......................................................... 166

Policy is “silly!” ................................................................................................. 166

We’d like the arbitrator to be another type of judge ........... 166

Matters the contract disallows from being grieved .......... 166

ARBITRABILITY/BIFURCATION OF THE HEARING ............................. 167

A LESSON FOR ARBITRATORS

WHAT IS JUDICIAL/ARBITRAL TEMPERAMENT? ..................................... 168

PREHEARING ISSUES – ..................................................................................... 168

SUBPOENAS & OBJECTIONS TO THEM ..................................................... 168
MOTIONS. How much evidence? Summary judgment? .................. 168
DO YOU REALLY NEED A LIVE HEARING?.............................. 168
HEARINGS IN A VIRTUAL WORLD..................................... 168
DISCLOSE EVERYTHING .................................................. 170
EXCESS OF POWERS .................................................... 170
DEALING WITH EMOTIONAL WITNESSES ......................... 171
DEALING WITH OBJECTIONS ......................................... 171
DEALING WITH THE OBJECTIONABLE ............................. 171
DRAFTING THE DECISION ............................................. 171
APPEALS OF ARBITRATION DECISIONS ......................... 172
CAN A DECISION BE APPEALED TO COURT ...................... 172
MCA 27-5-312 - UAA BASES FOR APPEAL ....................... 172
POST DECISION REQUESTS ........................................ 173
WHAT IS YOUR LEGITIMATE ROLE ............................... 173

CONCLUSION – Q AND A

APPENDIX

NAARB OPINION #26 RE: DISPUTES OVER LIVE VS VIRTUAL HEARINGS .......... 174
NAARB JUNE 26, 2020 LETTER ........................................ 176
JANUARY 11, 2021 LETTER FROM NAARB ............................ 178
INTRODUCTION AND OVERVIEW

Arbitration was intended to be an expeditious and fair way to resolve labor disputes. Defined: “simple process voluntarily chosen by the parties who want disputes determined by an impartial judge of their own choosing” i.e. the person parties dislike the least

Arbitration vs litigation – arbitration is at its very heart about letting people tell their story. It was originally designed be both quick and efficient and allowed both sides of a dispute to present their case to a person who understood labor relations and the collective bargaining process to determine the facts and the application of the “law” of the CBA to the facts and render an outcome that would be understandable to both sides.

Litigation is a far more complicated process involving extensive discovery and pre-trial motions designed in many cases to prevent people from telling their stories.

The other main difference is that arbitrators tend to be individuals who are adept at separating the “wheat from the chaff” in terms of evidence, who understand the process and the industry and who will not be swayed by the same sort of possibly prejudicial or emotional arguments that might sway a jury. Juries are also quite good at determining the facts of cases too, but might need to potentially be “protected” from such evidence lest the advocates prey upon perceived biases juries might have.

WHAT WE WILL DISCUSS

- Process of arbitration – how does it work
- Burden of proof, BOP, issues; general procedure – pre hearing issues; issues that come up during the hearing; evidentiary issues
- Discipline – what are the standards
  - Some specifics; serious offenses; insubordination; social media issues; off-duty conduct; marijuana related issues
  - What are the defenses to discipline and due process issues that can arise?
- Contract interpretation
- Past practice issues
- Management rights
- Seniority and different types of clauses
- Arbitrability – procedural & substantive
- Appeals of arbitration decisions
**WHAT WE WILL NOT DISCUSS**

- INTEREST ARBITRATION
- NLRB STANDARDS
- POLITICS

**SCOPE OF ARBITRATION**

Be careful what ask for – you might get it. For example, in *Penn Plaza v Pyett*, 556 U.S. 247 (2009) –CBA allowed arbitration of ADEA claims. The case did not result in the flood of arbitration it was predicted to but parties should be cautious and clear with arbitrator as to what the issue actually is. Arbitration is a “creature of the CBA.” ALL arbitral power stems from that agreement.

**STEELWORKERS TRILOGY**

*Steelworkers v American Mfg.*, 363 U.S. 564; *Steelworkers v Enterprise Wheel and Car*, 363 U.S. 593; *Steelworkers v Warrior and Gulf*, 363 U.S. 574 (1960). These are seminal cases in the arbitration practice and stand for the general proposition that arbitration is THE favored method for resolving labor management disputes. Much has been written about them since 1960 but they generally stand for the proposition that Arbitration decision must “draw its essence from the labor agreement.” The Supreme Court affirmed the rule that arbitrators have broad powers – decider of law and fact and of the remedy. The Court held in *Enterprise Wheel and Car* as follows:

“...When an arbitrator is commissioned to interpret and apply the collective bargain agreement, he is to bring his informed judgment to bear in order to reach a fair solution to a problem. This is especially true when it comes to formulating remedies.”

Thus, arbitrators have a LOT of power to determine the facts and the law of the case. Arbitrators should though remember the admonition of the Steelworkers Trilogy is to be careful how you use it and to be sure the result draws its essence from the labor agreement. What is “drawing the essence from the labor agreement?” That is generally for the arbitrator to determine, subject to Court review, and will depend on the facts, the language and the bargaining history of the parties, as well as how the language at issue has been applied and used in the past.

**BURDEN OF PROOF ISSUES**

Generally, the employer has the burden of proof in a discipline case; the union has the burden of proof where the claim is that management violated the CBA. Considerable time energy and ink has been spent discussing this. As one arbitrator put it years ago:

“I also have the perception that one has to be cautious about prematurely turning to ‘burden of proof’ ideas in the course of decisional thinking. It is susceptible to self-indulgent use to foreshorten the persistence of puzzlement, itself often enough an unpleasant and irksome experience, which sometimes is necessary to in order to break out of the underbrush of contention and loose ends of circumstance that clutter up and obscure the route of the tried to this reconstruction of events. As with legal conceptual reasoning in general, the relief supplied by invocation of the concept of burden of proof is experienced because further painful attention to the dilemma of irresolution has thereby been obviated; the need to be concerned about analysis has thereby been removed.” From *An Effort to Describe One’s Personal Decisional Thinking, 33rd Annual Meeting of the National Academy of Arbitrators, 1980.*
I am not completely certain what that meant in this context, but if that arbitrator’s point was that most of the discussion about the importance of burden of proof in arbitration is pedantic, intellectual sounding gibberish, his point was well taken. In other words, don’t rely too much on the notion of burden of proof – the real question is whether the arbitrator is convinced that there is enough evidence to show that the grievant really engaged in the conduct.

**Burden of Proof defined:** There are many definitions of this, but is essentially the burden to establish your claim b sufficient weight of the evidence necessary to persuade the arbitrator – who is the ultimate trier of fact in the case.

**Preponderance of the evidence – 50% +1.** The party with the burden must present evidence that it is at least more likely than not that a given fact occurred. This is usual standard in contract cases and some discipline cases, especially those that are considered more minor or where the conduct itself is not considered criminal. Examples of this might be absenteeism, safety violations, poor performance or other rule infractions. Note that these might still carry with them serious consequences but the conduct itself is not inherently egregious or heinous.

**Clear and convincing.** No set standard here but requires a little more than a 50% + 1 showing. This usually requires more than a preponderance but is a very loose standard. This is sometimes used in cases where the discipline is considered more serious or where the conduct itself might be criminal – i.e. theft, assaults, vandalism or fraud for example. Many arbitrators require a somewhat higher standard of proof in order to find that the employee committed such acts.

**Beyond reasonable doubt.** This is the criminal standard in the Courts and is a very high burden to meet indeed. While some arbitrators use this standard where the allegations are “criminal” in nature, – i.e. theft, assault, sexual misconduct, fraud and criminal damage to property cases. Most do not. The theory is that this is not a criminal court and while the penalty may be discharge – sometimes referred to as the industrial death penalty – the consequences do not result in a loss of freedom.

Elkouri notes as follows:

Concerning the quantum of required proof, most arbitrators apply the ‘preponderance of the evidence’ standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a ‘clear and convincing evidence’ standard, with some arbitrators imposing the ‘beyond a reasonable doubt’ standard. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at pages 949-951.

Elkouri notes, “Most arbitrators apply the ‘preponderance of the evidence’ standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher standard of proof, typically a “clear and convincing evidence” standard, with some arbitrators imposing the “beyond a reasonable doubt” standard. … Concerning the quantum of proof to be imposed in a case involving theft, an arbitrator stated:

I agree with the Union that a discharge for theft has such catastrophic economic and social consequences to the accused that it should not be sustained unless supported by the overwhelming weight of the evidence. Proof beyond a reasonable doubt, even in cases of this type, may sometimes be too strict a standard to impose on an employer; but the accused must always be given the benefit of substantial doubt.” Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at p. 951. Citing *Armour Dial*, 76 LA 96, 99 (Aaron 1980)
Arbitrators differ with regard to the burden of proof necessary to establish that the employee in fact stole something and should be discharged for it. Most require something more than a simple preponderance of the evidence and must be convinced that the facts clearly point to the grievant’s guilt. In the final analysis, the question may well not turn on the burden of proof at all but rather on whether there exists enough to convince the arbitrator that the grievant was guilty of theft.

Professor St. Antoine makes a similar observation. “When the employee’s alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee’s reputation, most arbitrator require a high quantum of proof, typically expressed as ‘clear and convincing evidence.’ Some require proof ‘beyond a reasonable doubt’ but, absent an express contractual provision to the contrary, most hold that the criminal law standard of ‘beyond a reasonable doubt’ has no place in an informal resolution mechanism like arbitration.” See, St. Antoine, The Common Law of the Workplace, 2nd Ed. BNA Books, 2005 section 6.10 at page 192

SO, WHAT IS IT WORTH? – THE RULES OF EVIDENCE IN ARBITRATION

I. INTRODUCTION AND SCOPE OF THE TOPIC

Arbitrators are typically not bound by the formal rules of evidence applicable to Court proceedings at the state or federal level. Arbitrators are of course famous for taking things “for what they are worth” and they typically do allow most everything into evidence for review later. Still though there are some rules of evidence that you might try to apply to try to limit the amount of evidence that is truly immaterial or irrelevant or which is submitted for the sole purpose of prejudicing the arbitrator. This discussion will focus on some of these rules and possible arguments to object to keep things out of the record or, at the very least, to advise the arbitrator that what he or she is about to hear is the equivalent of junk mail and should be disregarded before even opening the envelope.

We will first discuss some general rules regarding admission of evidence and some very general objections that are seen and then talk a bit about some unusual evidentiary scenarios but which seem to come up all the time in labor arbitration cases.

It is important to remember that admissibility of evidence is not to be confused with the probative value of that evidence. Simply admitting it into evidence does not mean that it will be persuasive or that the arbitrator will place much stock in it. This discussion is about the arguments you can use for or against admitting the evidence in the first place.

Keep in mind that the rules of evidence were originally intended for Court proceedings to protect juries from evidence that was prejudicial or was legally inadmissible for various reasons. Juries were thought to be generally unsophisticated in the law; uninterested in the process (after all they were essentially drafted to be there) and swayable by clever lawyers who played to their emotions rather than to the applicable law or the facts. See e.g., Rule 403 of the Federal and Minnesota Rules of Evidence that essentially provide that if the evidence is confusing, wasteful of time or prejudicial it is to be excluded. Thanks, but the real question it seems to me is what does that look like.

These general rules only partially apply in my view to the arbitral process. There you have a single or sometimes a tripartite set of triers of fact. They are presumably familiar with the process and with contractual interpretation and have some experience with the very sorts of cases they are hearing. In short, they are more able to separate the wheat from the chaff and understand what evidence is probative and relevant and what is not. See Murphy, The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, pp. 253, 263-64.
WHY IS A DISCUSSION ABOUT EVIDENCE IMPORTANT?

Because without the evidence you need to win, you lose.

First, you must determine what evidence you need to win – whether you have the burden of proof or you are defending a case – what evidence do you need to prove your case and/or disprove the other side’s case?

The real key is preparation. Determining the facts early on and then doing a little research to see how those facts fit into a set of arbitral principles will give you the best chance of presenting your case to an arbitrator in as coherent and organized a fashion as possible. Spending some time early on to develop the facts of the case and to determine what strategy to pursue in presenting it will give you the best chance of success. What you will need to do is to break your case down analytically so that the arbitrator knows the factual and contractual/arbitral basis for your position.

A. Try to think like the other side. When questioning your witnesses try to see what the other side would want if they were cross-examining this person. There is nothing worse or more devastating to your case than having a witness say something inconsistent on the stand.

B. Follow up on all leads even though you think they’re dead ends. There is also nothing like having a witness show up with facts you were not aware of during the hearing. If a witness thinks someone else may have heard the conversation but isn’t sure, check that out. Contact the people who may have any knowledge of the facts giving rise to the case.

C. Talk to people more than once to check out their story. It’s a good idea to go back once in a while, if you have time, to confirm that what people told in the beginning is still what they will say on the stand. People’s stories change and they talk to each other and occasionally talk each other into or out of things they may have told you.

Find the elements of the case. Once you have found out what happened it is very important then to do some research and map out a theory of the case. This of course will vary with each case but involves finding the so-called elements of the case. The elements are those principles or facts necessary to reach a certain conclusion and are the things you are going to have to prove or disprove depending on which side of the case you are on in order to win.

The elements are a roadmap to the goal you want. The evidence supporting those elements and how you present it is the art of advocacy.

Tell the arbitrator the story. The arbitrator needs to know what happened in an organized but memorable way. The way in which your story goes into the arbitrator is one measure of the strength of your case.

RELEVANCE AND MATERIALITY

One of the most often used objections is that the evidence is irrelevant and/or immaterial and should be excluded. This frankly is tough to prevail on and most arbitrators will take the evidence “for what it’s worth” and indicate that the objection may go to probative value. In other words, how strongly the evidence tends to show the existence or non-existence of a fact rather than that the evidence has no bearing at all on the proceedings.

Most arbitrators admit evidence over objection that it is irrelevant since it may well not be known how relevant it is until all the facts are heard. It may well not be relevant in the final analysis but the arbitrator will be the judge of that. Professor Sinicropi cited Dean Harry Shulman as follows:
The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out.” Evidence in Arbitration, supra., at p. 8, citing Reason, Contract and Law in Labor Relations, 68 Harvard Law Review 999, 1017 (1955).

Dean Shulman’s observations are as relevant and true now as it was in 1955.

Generally, there is a loose standard that allows the inclusion of most evidence almost no matter how relevant it is. See Rule 28, Voluntary Labor Arbitration Rules, American Arbitration Association.

A. Relevance. Relevance has been defined as follows: Evidence is relevant if it tends to support a party’s case or impeach the testimony of a witness. Common Law of the Workplace, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 46, section 1.78.

Rule 401 of both the Federal and Minnesota Rules of Evidence define it as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

One commentator on the arbitral process observed that, “the most important criterion of admissibility of proffered evidence is relevance. In litigation court require evidence to be probative of a material issue before it may be admitted. Unlike the judicial system, however, arbitrators rarely deny the parties the opportunity to present evidence on the basis that it is immaterial or irrelevant. Rather, arbitrators will generally admit the evidence ‘for what it may be worth.’ … The concept of relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and the issue(s) asserted in a case.

Accordingly, if testimony or exhibits arguably have any tendency to make the existence of the fact or issue to be proved more probable than not, the criterion for relevancy is established. … It is noteworthy that in a close case concerning the relevancy of evidence, arbitrators invariably side with the view that the evidence should be received. See the quotation above from the late Dean Harry Shulman.

B. Materiality. Somewhat related to the issue of relevancy, questions of materiality involve the specific issue a party will be attempting to establish. Where evidence is relevant to a proposition of fact, but that proposition is not relevant to the issue before the arbitrator, the evidence is immaterial.

For example, the question of whether an employee goes to church every Sunday has absolutely no logical bearing on whether his attendance is poor or whether a discharge is proper due to the employee’s production of too many defective parts. Materiality is thus slightly different from the concept of relevancy in that while relevancy relates to whether a piece of evidence makes a fact more or less likely to be true, materiality goes to whether that fact makes any difference to the ultimate outcome of the hearing.

As another example, where the issue is whether the employer violated the agreement and/or past practice between the parties when it unilaterally changed several bargaining unit job descriptions how material was evidence that the grievances met the qualifications under the old job descriptions? In that case a school district had promulgated new job descriptions and posted them. The Union grieved the matter claiming that the district did not have the right to do this unilaterally. It was stipulated that the grievances did not meet the qualifications for the new jobs but may well have met the qualifications under the old job descriptions. In that matter had the arbitrator ruled that the district did not have the right to unilaterally approve new job descriptions the district would have had to re-post the jobs.
The union attempted to introduce evidence regarding the qualifications of the grievants. This was excluded since it did not bear on any issue in the case. See, *AFSCME Council 65 and ISD ##316 Coleraine Schools*, Minnesota BMS 02-PA-311 (2002). That evidence was thus immaterial.

**DOES ALL EVIDENCE HAVE TO BE “RELEVANT” TO BE ADMITTED?**

As noted above, the traditional modus operandi of most arbitrators is to accept the evidence and deal with its probative value later, to take it for what it’s worth. Indeed, some statutes provide for the vacation of an award where the arbitrator refused to hear evidence. See Uniform Arbitration Act, M.S. 572.19. Thus, when faced with the choice arbitrators will still tend heavily toward admission of evidence rather than its exclusion. It is only where there is some other compelling contractual or statutory or policy reason to exclude it that most will sustain an objection to a piece of evidence on relevancy grounds.

What if the evidence is truly not relevant however or the evidence does not strictly apply to an element of the case? The commentators have more recently been split over the question of whether to allow this in.

On the one hand, earlier commentators have observed that “[I]t may be advisable, within limits, to admit all evidence notwithstanding questions of relevancy. On occasion, evidence will be proffered which recognizably has no probative value but which should nonetheless be admitted, because to exclude it would be too damaging to confidence in the efficacy of the grievance procedure among unsophisticated participants in the arbitration. Some call this therapy evidence, and are willing to admit it so long as the therapy itself does not become too traumatic.” *Evidence in Arbitration*, Hill & Sinicropi, BNA, Inc., 1980 at pp. 7. This view holds to the notion that an arbitrator should take virtually everything as long as not too much damage is done; whatever that means.

Other commentators and arbitrators have made similar observations. Elkouri notes that under statutory rules applicable to arbitration as well as agency rules give wide latitude to arbitrators to determine relevancy and materiality and that reviewing Courts give wide deference to those determinations. See, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at pp. 341-49.

One commentator even observed that the process itself may well depend on the perception that the arbitrator is sifting through all the evidence in an effort to gain as much insight as possible on the case before deciding it. He noted as follows: The acceptability of the final award will be determined, to a substantial degree, by the parties’ reactions to the arbitrator as they observe him at the hearing. One of the ways to win acceptability for the award is to be patient in hearing all that both sides want to present. Each party should be allowed to continue for as long as it feels there is something it should say. Such procedure will give both parties the satisfaction that they have had their ‘day in court.’” *Wright, The Use of Hearsay in Arbitration*, Proceedings of the 45th Annual meeting of the National Academy of Arbitrators, p. 289.

Using these rules, it would be pretty hard to successfully oppose any evidence however and this very broad “take it all no matter what kind of effluvium it is” approach has now been questioned and even criticized. Justice Holmes once wrote that the “rule or relevancy is a concession to the shortness of life.” A great arbitrator I know well once remarked that while he wanted to hear people’s stories, he didn’t want to hear their life stories.
In a recent discussion at the National Academy of Arbitrators, one arbitrator noted “admitting a document which I presume I’m not going to consider because it is irrelevant or prejudicial, but will let into the evidence in order to avoid an argument, doesn’t strike me as proper arbitral practice. While we do not apply the rules of evidence strictly, we do not throw them out the window.” Barry Winograd, “Going Beyond ‘Taking It For What It Is Worth – Are There Basic principles of Evidence in Labor Arbitration?” (Citing from comments made by Arbitrator Leo Weiss) 58th Annual Meeting of the National Academy of Arbitrators. Slip op. at p. 7.

Arbitrator Winograd also cited a 1990 report by Arbitrator Jack Flagler in which he noted that “the second most common complaint cited by the survey respondents centered on the controversial practice of admitting various forms of infirm evidence into the record ‘for what it’s worth.’ The problem for both advocates is that neither can know what weight, if any, the arbitrator may ultimately assign to such infirm evidence as uncorroborated hearsay, unauthenticated document, speculative or conclusionary testimony, inadequate foundation and sundry irrelevancies.” Flagler, Practices at the Hearing, Proceedings of the 43rd Annual meeting, National Academy of Arbitrators, p. 53.

It is obvious that this practice of allowing anything in irrespective of its relationship to the case or any issue involved in the case has now been thrown into some disrepute. The bottom line it seems is that there is no clear answer and although arbitrators still justifiably lean heavily toward allowing evidence in, advocates need to be prepared to show why something is being introduced and to explain how it is relevant and material and to show that there is not undue prejudicial value in having it be introduced over the objection of the other part.

**PRACTICE TIP:** Don’t confuse relevance with probative value – a document may well be admissible but have little or no value to your case – simply introducing a document about notice of a rule is of no value if it as not distributed to the employees, at least for issue of notice.

As an example, in one case the Employer introduced its policies regarding punching in on the time clock where the argument was whether the grievant was actually aware of those policies. The Union objected that the records were not admissible since they did not show whether the grievant knew of them or was aware of how they worked. The objection was overruled on basis of foundation – but question of notice is separate.

**ARE AFFIDAVITS ADMISSIBLE IF THE SIGNER IS NOT AT THE HEARING?**

Affidavits are supposed to be sworn statements representing the affiant’s solemn and truthful citation of the facts as they know them but that frankly doesn’t fly very far in the face of the claim that there is no opportunity for cross examination. Indeed, the late and venerable Professor Irving Younger used to regale his law students with the statement that the greatest engine for the determination of truth in all of recorded history was cross-examination. Only there could the story be probed and prodded and tested for veracity and consistency. OK, so how do you start the engine with nobody at the wheel to turn the key is the ultimate question.

The scenario is this: one party offers a signed seemingly notarized affidavit in which a witness makes several statements about material facts to the case and seeks to have it admitted into evidence and even my say that the arbitrator may afford it the weight that he or she sees fit given that the declarant is not there for cross examination. The other party objects on that very basis and claims that the statements are not subject to cross-examination and should not even be introduced into evidence.

The party offering it says that the statement is notarized and is therefore truthful and that the person making the affidavit is out of town and that their testimony is critical to the presentation of that party’s case; indeed, without it the case may even fail. The arbitrator is then expected to rule on whether to take this or not.
Elkouri notes that affidavits are sometimes used in arbitration but are subject to the same limitations as other forms of hearsay evidence. AAA Rule 29 provides that arbitrator may receive and consider the evidence of witnesses by affidavit but should only give it such weight as they deem it entitled to after consideration of any objections made to its admission. Elkouri, 6th Ed. at 368, citing CF Motorfreight, 110 LA 186, 190 (Murphy 1997).

Elkouri’s comments also make some reference to whether the person is available to testify or whether it appears that there was any effort made to explain their absence. These factors may weigh on how much weight to give such evidence or whether to take it at all. See Grace Industries, 102 LA 119 (Knott 1993) (ruling that the affidavit of the grievant’s supervisor was not admissible where he was not present and there was no explanation for why he wasn’t there).

Professor St. Antoine observed too that unless allowed by agreement, statute or applicable agency rule, sworn declarations or affidavits may not be considered competent evidence by many arbitrators, if the other party objects, since the declarant is not available for cross-examination. Common Law of the Workplace, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 37, section 1.58.

Presumably, if the testimony is that crucial, then either have that person there or continue the hearing until they can be. If there are truly some circumstances such as illness or a transfer out of town or something the party offering the affidavit should make it clear why the person cannot be at the hearing and that may provide some basis for the admission of the document. Finally, with technology being what it is, get the person by phone or by videoconference so they can be examined essentially “in the presence of the arbitrator.” Elkouri notes too that in some circumstances it may be appropriate to continue the hearing to allow for the appearance of the unavailable person either by direct testimony or by deposition or by phone.

Bottom line: do not rely too heavily on evidence by affidavit. Some arbitrators won’t take them at all and those that do are likely to give them very little weight especially if they bear on an element of the case or an ultimate fact question.

WHAT ABOUT STATEMENTS THAT AREN’T NOTARIZED, BUT ARE STATEMENTS MADE BY OTHERS AND OFFERED BY SOMEONE ELSE?

Doctors slips, police reports, customer complaints, contemporaneous notes made during a meeting or even just an unsworn statements or letters are sometimes introduced as evidence.

Here are several common scenarios.

Scenario #1. The grievant is disciplined for allegedly being rude to a customer. The employer, a retail operation, does not want to drag the customer into the hearing but seeks to introduce their written complaint about the grievant submitted a fairly short time after the alleged incident. The employer argues that this is the crucial piece of evidence and without it their entire case goes away.

The union very much agrees with that assessment and argues that it cannot adequately defend against these allegations without having the person there to testify. The union further argues that the grievant has a fundamental right to face the accuser and that while this isn’t a criminal case it sure feels that way, especially if they are about to lose their job.

Professor St. Antoine notes that “naked hearsay” documents include things like doctor’s notes, customer complaints statements by persons who do not appearing at the hearing. He notes though that many of these may be admitted by the arbiter subject to weight. “Some arbitrators, on their own, or on the basis of the parties’ practice or acquiescence, will admit ‘subject to weight’ such relatively routine items as doctors’ statements concerning an employee’s absence because of illness whether sworn or not, or other documents such as police reports.
Rules against admissibility do not apply to documents that are deemed intrinsically reliable, such as records kept in the normal course of business.” See, Common Law of the Workplace, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 37, section 1.58.

Indeed, one of the recognized exceptions to the rule against hearsay is that the document is kept in the normal course of business. Thus, a customer complaint may be admitted and given appropriate weight. Obviously, it is the unwise employer who attempts to base the entire case on that alone without any additional evidence to establish the veracity and accuracy of such a statement. Any additional evidence such as the testimony of the person who took the complaint would be relevant in establishing that and that person could be cross-examined at the hearing.

Scenario #2. The grievant is fired for abuse of vulnerable adults, VA’s. This allegedly occurred while the grievant was alone with a developmentally disabled adult and there were only 3 witnesses; the grievant, and two such developmentally disabled adults. It is clear that these people have very limited cognitive skills and very limited long-term memory. The employer seeks to introduce written statements made by staff members who interviewed these people. The hearing is well over a year after the incidents in question.

The Employer argues that due to the nature of the VA’s disabilities and mental capacity, they cannot recall much now. They also argue that the nature of the facility, these folks should not be called to testify since this could be very stressful to them and could potentially disrupt the relationship, they have with the staff people there.

The union argues that the statements are actually double hearsay and that without the ability to cross-examine the complainant and the witness they cannot effectively defend the case.

The employer puts on staffers who took the statements to give the foundation for the statements and their impressions of the complainant and witnesses’ demeanor and their capacity for truthfulness. The objection is raised and the Union requests that the staffers not be allowed to testify about the content of the statements or to give their opinions as to the veracity of the VA’s.

Professor St. Antoine notes that “a distinction is drawn between the situations where there is at least a witness who may be cross examined, giving the hearsay evidence and where there is a naked hearsay document that is not subject to cross-examination. The latter may be ruled inadmissible absent special exceptions.”

Elkouri also notes that “it has become commonplace in arbitration hearings for parties to introduce contemporaneous notes, reports or written statements in order to refresh a witness’s recollection, impeach a witness’s credibility or use as stand-alone evidence to prove or disprove certain facts. Even where the author of the written material is not available to testify, arbitrators have allowed these contemporaneous notes into evidence over hearsay objections. The admissibility of notes or reports made contemporaneously with the event in question has considerable support in the Federal Rules of Evidence as a hearsay exception. “Elkouri, How Arbitration Works, 6th Ed, at p. 369.

In the above scenario if the staff people were available to testify and were professionals trained to give their opinions as to the VA’s mental state, their testimony would likely be admitted. Keep in mind that the definition of relevance is whether the evidence tends to establish whether a fact is or is not true. Based on this very broad definition it would be admitted. How much weight it would be given would certainly depend on their testimony and the other evidence in the matter.
ASSESSING WITNESS CREDIBILITY – ONE OF THE HARDEST THINGS OF ALL

This is one of the hardest things to do. People do not come with a little flag that pops up if they are lying or stretching the truth – Pinocchio notwithstanding. Anyone driven by the necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty looking, ill at ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers. Edgar Jones Jr. 19th Annual meeting of the NAA (1966)

Look for consistency – with prior statements, with documents or with other testimony.

Motivation to lie – do ALL fired employees lie to save their jobs? Quick answer: No. But some do. Your job is to figure out which is which. Is this simply a mistake – lying implies intentional misrepresentation of the facts. Is the witness just wrong or has forgotten something?

No litmus paper test here. This is why they hired you.

LAYING FOUNDATION

The notion of foundation is about qualifying the evidence so that you can establish that there is a basis for the testimony or the document is genuine. It may be worth discussing this before the hearing with the other advocate so that you know whether there will be an objection to this and can prepare for it. You can save a lot of time by stipulating to the foundation or admissibility of documents, especially if they are voluminous, by taking some time prior to the hearing.

A. For Documents

There is no magic to this. First, make sure that your witness is aware that you will be introducing it on the record before he/she takes the stand – nothing like having your star witness look at a document you need and say they’ve never seen it before. This is part of the preparation you need to do before the hearing even begins.

Second, make sure you have enough copies to show the advocate, the arbitrator and the witness so everybody has a copy of it and is looking at it at the same time.

Third, get the witness to identify the document. It is best that the witness knows who drafted it, if he/she did not draft it and whether they are familiar with its contents. Sometimes there will be other writing on it in the margins. If they know who made these marks have them identify those so the arbitrator knows that the document is genuine.

Keep in mind that identifying and laying foundation is different than having the witness testify about the contents of the documents itself.

OBJECTIONS: If you are on the other side you have the right to “voir dire” the witness. In other words, to ask a few questions for the purpose of making an objection. There is no set format for these but you do have the right to inquire about whether the witness really does know where this document came from or how it came into being. If you find that the witness is not familiar with the document or its origins then object that there is a lack of foundation for it. It will then be up to the party seeking to introduce it to either lay more foundation for it or get it in through another witness.

Hearsay objections can apply to documents as well – they are out of court statements after all. Some are self-authenticating and thus subject to an exception. Business records, medical records are also typically within the exception.

B. For witness testimony

Again, the witness must possess the requisite knowledge of whatever it is they are about to testify in order to avoid an objection. For example, if the witness is to testify about a conversation he
or she overheard or statements made by the grievant, you must establish that the person was there, where they were and that they in fact heard what they say they heard.

So, if the witness is to testify about working conditions make sure they indicate how long they have been there, whether they worked on the same shift etc. There is no magic to this either but if someone is going to testify about anything make sure they know whereof they speak.

**EXPERT OPINIONS**

These really break down into several different parts.

First, who is the expert and is the person is truly an expert or not. You must lay a foundation for the expert opinion. This means getting them to testify about their area of expertise – if they are doctors have them submit their resume or curriculum vitae and testify about their training, practice, expertise, and any subspecialties in which they are certified. Other specialties will follow the same general procedure – whether they are engineers, social workers or investigators.

Second, is the expert testifying on a subject that is within the province of the arbitrator? For example, are you calling an “expert witness” such as a union business agent or an HR labor Relations manager to testify about what the disputed contract language means? That’s the arbitrator’ job and the “expert” opinion will be of very little value.

If they are being called to testify about what was said or negotiated during bargaining, that is a very different story and that is relevant and admissible.

Third is the situation that doesn’t really involve opinion per se but involves the introduction of testimony from one party to a negotiation about what he or she said to their principle, i.e. union membership or employer Board about what they thought the disputed contract term meant.

**Scenario #1.** This isn’t a labor case, but it illustrates the point regarding qualifying an expert. In *Kowalik v Martinson Construction*, 64 W.C.D. 507, (W.C.C.A. 2004) summarily aff’d October 27, 2004, the Minnesota Workers Compensation Court of Appeals, W.C.C.A., reversed a denial of benefits on the basis that the employee was intoxicated at the time of injury.

The employee was injured in March of 2002 when he fell off a roof working for the employer. He was drunk and the W.C.C.A. affirmed that finding. He had been drinking the night before the injury and on the day of the injury and admitted he was an alcoholic at the time of the injury. He apparently blew a 0.30 BAC when he went to the hospital. He fell when he was climbing around on the roof and stepped on a board, he thought had been secured but it wasn’t and fell some 20 feet.

The Judge found that the employee was intoxicated and this was affirmed on the basis of the medical blood work done when he got to the hospital. The question was whether under M.S. 176.021 the intoxication was the proximate cause of the accident. The Judge found that it was but had allowed into evidence over the employee’s objection the testimony of a roofing expert who was ostensibly called to provide testimony about whether the board the employee had stepped on should have been stepped on. What?

This so-called expert apparently spewed on about how, in his opinion, the intoxication was the proximate cause of the fall. Apparently, the basis of his opinion was that any competent roofer would have known that the board the injured worker stepped on wasn’t fastened very well and that the only plausible explanation for the fact that he did was that he must have been drunk. To say that this guy had absolutely no foundation whatsoever to make that statement understates it but that’s what he said. The guy was a roofer; how does that qualify anybody to be an expert on intoxication? OK well, maybe it does.
The W.C.C.A. held that normally this would be a fact issue for the Judge to determine but here the Court found that the Judge’s conclusions were based almost entirely on the opinion of this roofing expert cum toxicologist without portfolio and reversed it.

I include this here because it illustrates the problem when finders of fact introduce every piece of junk imaginable and it is then not clear whether they relied on it or not and because Workers Compensation Judges, like arbitrators are not, at least until very recently, bound by the formal rules of evidence.

Professor St. Antoine notes that expert testimony is proper if the facts are accurately stated and the opinion has adequate foundation. See, Common Law of the Workplace, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 39, section 1.63. This will almost always be allowed into evidence. See also Elkouri and Elkouri, How Arbitration Works, 6th Ed. at p. 393.

Bottom line: if you want an expert; hire an expert who has the credentials and resume to back up their conclusions. This seems pretty obvious but keep in mind that the guys who tried the Kowalik case were lawyers and should have known better.

PRACTICE TIP: Witnesses are allowed to give their opinion about things that are within the common knowledge of reasonable people. They can also give their testimony about what they observed as long as it is fact based. Thus, while a lay person may not be qualified to say if someone was really “under the influence” they can certainly testify about what they saw, the person’s demeanor, smell of alcohol, slurred speech etc.

Be careful though of editorializing by the witness and you may want to object if the witness begins to ad lib and begins to attach subjective qualities to their testimony.

Scenario #2. We’ve all seen this one. The case involves the interpretation of a contract clause that is the subject of conflicting interpretations by the parties. One party calls a witness to testify about what the clause means. The other party objects on the basis that this testimony invades the province of the arbitrator.

Professor St. Antoine notes that conclusions about what the law is or what the contract says are not generally admissible even if delivered by an “expert” in the law or contracts. It may also likely not be admissible even if this testimony is offered by someone from the parties who professes to “know” what the contract means and how the arbitrator should interpret it. See, Common Law of the Workplace, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 38-39, section 1.62. Professor St. Antoine notes that “such conclusions are for the arbitrator to draw even if the arbitrator is not legally trained. In arbitration this view carries over to opinions, even from experts in the field of collective bargaining, about the meaning of provisions in a labor contract.”

This is sometimes said to “invade the province of the arbitrator.” After all isn’t that why you hired the arbitrator in the first place; i.e. to interpret the labor agreement? Frankly, this should not be allowed in most cases however some do allow it because it sort of falls into the category of evidence that Professors Hill and Sinicropi called “therapy evidence” where the parties are allowed to give their views about what the contract means even though it is obvious that the other side has a conflicting view. Some will allow it knowing that the arbitration process is somewhat cathartic and allows for people to have their day in Court, as discussed above. It may even be useful for the parties to set up negotiations for the next time.

Keep in mind that this is different from testimony about bargaining history. That is generally always relevant and should be admitted. It is also different from testimony and evidence about how the contract has actually been applied; i.e. past practice types of arguments. How it has been applied is very compelling evidence about what the parties intended in contract interpretation cases.
Scenario #3. One side calls to the stand a witness to testify about what one side to the contract negotiations told its membership or Board about what the term meant. I see this from time to time as well. The contract term is disputed and one side brings in a member of the negotiating team to testify about what they told their principle about what the term meant. It isn’t what they told the other side but rather what they told their side in closed session. There is very little guidance on this from the commentators and some arbitrators may allow it, but give it very little weight. Others may not on the theory that contract interpretation is the arbitrator’s bailiwick and it simply is not important what one side thought it meant but did not articulate to the other side.

In general, this type of testimony or evidence may be allowed on the theory that while not very probative it is a piece of evidence that may tend to show the existence of a fact and thus falls into the broad definition of relevance. This too may well fall into the category of therapy evidence and arbitrators can and will use their fairly broad discretion to allow it and give whatever weight they think it deserves.

CIRCUMSTANTIAL EVIDENCE

The late professor and arbitrator Tony Sinicropi states that in general there are two basic types of evidence: direct evidence and circumstantial evidence. See, Sinicropi & Hill, Evidence in Arbitration, BNA, 1980, at pp. 4-6.

Direct evidence is essentially eyewitness testimony or other direct evidence regarding what the witness saw or heard or otherwise observed. Obviously, direct evidence of the matter you are attempting to prove is best but you don’t always have that. Direct evidence is generally the “best evidence” however; one observer has noted “many times direct, eyewitness proof is valueless, for it is not uncommon for the eyewitness to be in error.” A.P. Green Refractories, 67-1 ARB 8338 (Krimsley 1967).

Circumstantial evidence is evidence from which an “inference with respect to some fact other than the testimony which is offered as evidence to the truths of the matter asserted.” Evidence in Arbitration, at p. 4. Professor Sinicropi correctly points out however, that one should not assume that simply because circumstantial evidence is offered it must by definition be accorded less weight or that it is somehow suspect. There may certainly be instances where circumstantial evidence may not be afforded much weight; as in the case where there is competent, direct evidence to the contrary is offered to counter the assertions made by circumstantial evidence. Clearly there are times when arbitrators must decide cases based largely on circumstantial evidence. Elkouri cites several examples of how this might be used. See, How Arbitration Works, at pp. 452-53.

Simply because no one saw the grievant take an item does not necessarily absolve him from guilt if it can be shown that he was the only one with access to the tool locker at the time a theft occurred.

The bottom line here is that both types can be used and used effectively and are both not only allowed but also can, in some situations, even be given equal weight.

HEARSAY

What is hearsay and what isn’t it. True hearsay is defined by the Rules of Evidence as “an out of Court (or out of arbitration hearing) statement made to prove the matter asserted therein.” The classic case involves a witness who is asked to testify about what he or she heard from someone else who is not testifying and the reason the testimony is offered is to prove the truth of the statement made by the other person. More time and energy are spent arguing about this than perhaps any other evidentiary matter, other than perhaps relevance and probative value.
Professor Sinicropi notes that there is in reality a three-part process. See, *Evidence in Arbitration*, at p. 43. First, there must be a statement of some kind. This can be a statement or assertion but can also involve conduct as well.

Second, it must be made by someone *other* than the person who is testifying in Court or at the arbitration hearing.

Last, it is offered in evidence to prove the truth of the matter asserted. See also, Fed. Rules of Evidence, Rule 803. One also needs to know whether the statement is offered to prove the truth of the matter asserted. For example, is the statement about a conversation offered to prove the truth of the statements made in the conversation or that there was a conversation, thus establishing that someone was there, and who cares what they talked about? If it is the former it is hearsay and may not be admitted; if it is the latter it is not literal hearsay and will be admitted.

The rule against hearsay is essentially based on the notion that since there is no opportunity to cross-examine the actual person who made the statement and thus no opportunity to assess credibility by a jury, out of Court statements are disfavored. The underlying notion may however be different in arbitration where the matter is tried not to a jury but an arbitrator or panel of arbitrators.

**Admissions of a party opponent** – Theoretically this is not an exception, but statements of this nature are not considered hearsay since they are admissions. Presumably they would not be made unless they were accurate because they may be against their interest. Note too that even the formal rules define away a statement by a party opponent. See Rule 801 (d). Statements made by a party to the action which are essentially against their interest are not considered hearsay and are not excluded. Thus, if a statement is allegedly made by a party it will generally be admitted.

For example, the witness says that he heard the grievant admit guilt. That is admissible. A statement by a supervisor that he did not believe that the grievant should be fired is another possibility.

The essential argument about hearsay is usually over the exceptions to the general rule and there are a bunch of them. The formal Rules of Evidence Rule 803 identifies 23 exceptions to the general rule excluding hearsay and thankfully, we will not go through all of these but will rather talk about a few of the more well-worn ones.

**B. Some exceptions to the hearsay rule** – Keep in mind that these are but a few – there are many more under the formal rules. Consult Fed. Rules of Evidence 801 and 803 for a complete list:

- **Excited utterances – 803 (1)** - a statement made relating to a startling event may be an exception. The notion is that people who are frightened or confronted with a very stressful situation are not likely to have time to make up a statement. Since the credibility to the person making the statement in Court can be assessed, the Courts generally allow this type of evidence in.

- **Business records or official government records.** If something is kept in the normal course of business it is generally considered credible and are generally allowed in without actual testimony regarding how the record was created. There are many examples of this, but financial documents, any document that may be required for internal or external compliance, such as tax documents etc. are generally admissible even though the author may not be available. Do get this in, simply have a person with knowledge of those records testify as to what they are, why they are kept and that that they are kept in the regular course of business for a business purpose.

- **General reputation regarding character or personal history.** This doesn’t come up very often but has occasionally been used to establish a backdrop for other matters. Testimony of this nature might be that the grievant has a reputation for hard work or not or that the person has a tendency to do something like skip steps.
So, what does all this have to do with arbitration since we are not bound by these formalistic rules? Elkouri notes that most arbitrators will allow even the most brazen of hearsay evidence for “what it is worth.” See, *How Arbitration Works*, at pp. 450-51. That is the essential issue: what is it worth? This will absolutely depend on the case and the evidence being offered especially in light of any other evidence in the matter. The real issue is thus not formal rules but the degree of probative value to be given to a hearsay statement.

**PRACTICE TIPS**: Some tips for those seeking to have hearsay introduced: First, ask whether it really is hearsay. Why is the statement being offered? Who made the out of Court statement? Is it the grievant or a supervisor about the grievant or is it a co-worker who may or may not have knowledge of the facts? Is it truly just a rumor-based statement where the person making the statement had little or no actual knowledge of the facts?

For the person seeking to either keep this evidence out or to minimize its impact: Examine, as above, whether the person making the statement had any basis on which to make the statement. If one can “cross-examine” the utterer of the statement without a chance to rehabilitate that witness it can be very effective in reducing the probative value of the statement itself. How far removed is the statement? Is this double or even triple hearsay where the person testifying heard it from someone else? This is the old telephone game we played in grade school. If this is the case the probative value of hearsay statements will be low indeed.

**PRIVILEGED TESTIMONY**

**A. Work product or attorney client privilege.** Most arbitrators will not allow those statements. Doing so potentially compromises the sanctity of the attorney client relationship by the forced disclosure of confidential communications. However, statements made during the grievance process are generally not privileged unless the parties have agreed otherwise. Note that this would not include offers of settlement, as they are generally not allowed in. See below.

Most arbitrators will not allow work product statements to be introduced or statements made between grievant and the union BA or steward made during the course of the grievance process however if that conversation was confidential in nature. Likewise, arbitrators will not generally allow statements made by supervisors to the Director of Human resources for similar reasons.

Other types of privileges include, husband-wife, priest-penitent, doctor-patient and statements made during mediation. The common law has long held that protecting these types of relationships is more important than what they might show at a hearing or trial. Thus, if the ex-wife gets called at a hearing to testify against a grievant, the grievant’s advocate should immediately object and assert this privilege. Most arbitrators will respect it and disallow the testimony.

**B. Be careful not to inadvertently waive the privilege.** As a rule, you should not call anyone to whom the grievant has given a privileged communication as asking them to discuss any part of the conversation may well result in a waiver of the privilege as to the rest. Be careful calling the grievant’s spouse or attorney in some other proceeding, although the attorney should raise the issue of privilege anyway.

**C. Limited waivers of some privileges.** For example, if the issue in the matter involves the claim that the grievant is ill then his medical records may well come into play and the grievant may have to waive the privilege or some part of it in order to make the claim.

For example, HIPAA, the Health Inventory Portability and Accountability Act, will protect certain medical information. Arbitrators frequently honor objections based on these types of statutes but can issue a protective order to protect the privacy of the information and can issue orders requiring that those involved with the hearing not divulge the information beyond the confines of the hearing room and that only those having the need for the information have access to it.
In some states in the public sector there may well be statutory schemes that makes some information private or even confidential. This seminar will not seek to discuss all of the intricacies of that law however it is important to recognize that there are many matters, which are considered private or even confidential data under this law.

Accordingly, an employer may well object to the request for discovery and may also object to any attempt to introduce evidence that runs afoul of this law. Arbitrators can issue protective orders, which allow the limited use of this evidence in some circumstances. You should therefore be prepared to deal with any Data Privacy issues that may arise and perhaps even suggest or request a pre-trial conference with the arbitrator in order to deal with these often time thorny issues prior to the arbitration hearing.

D. Settlement offers or statements made in mediation. Settlement offers made during the course of the process are generally not allowed and will be excluded by most arbitrators. The rationale behind this is to encourage voluntary resolution of disputes. If someone were forced to disclose what the statement offer was this could in fact prove unduly prejudicial to a trier of fact later on. Likewise, the mediation process is both voluntary and confidential in most cases and to work properly must encourage the open and candid assessment by those involved. Thus, statements made during mediation are generally not allowed.

This may not apply to statements made during contract negotiations however unless there is a specific understanding that certain statements or documents will not be raised in any subsequent arbitral hearing.

It has long been held that contract negotiations are relevant to contractual intent. Statements made or, in some cases the fact that there was no statement made in response to something one side said in negotiations can indeed be admissible.

The mediations here are those dealing with the resolution of a grievance of another claim. It can also apply to those grievance resolutions that are specifically agreed to be kept confidential or where there is a specific agreement that the resolution will not be precedent setting.

DEMONSTRATION, VIDEOS AND PICTURES

There is an old adage that a picture is worth a thousand words but being there is worth a thousand pictures. To the extent that you can show an arbitrator the truth it is generally preferable than telling the arbitrator the truth. The unfortunate reality is that in our video, CD and DVD society many people have the attention span of a goldfish when it comes to reading 1000 pages of single-spaced text and to make your point effectively the use of videos and graphs or other demonstrative evidence may be very helpful.

1. Demonstration evidence. If the matter involves an issue where time and space are important, and many do, then if at all practicable, take the arbitrator on a short tour of the area where this was supposed to have happened. I find this to be very helpful and educational. This is especially true if the matter involves the operation of a machine or other piece of equipment or where some knowledge of the physical layout of the places where the events occurred is important.

The issue may arise as to whether the demonstration is accurate and obviously the parties will raise any objections as to whether the demonstration or graphic evidence is accurate. If your intention is to show that the glove fits, make sure it does before you do the demonstration.

2. Videos and pictures. These too can be very helpful in certain cases. In one case, the parties did a very nice job of providing graphs and charts to demonstrate their respective cases on a matter involving an allegation of pyramiding. In that particular case to have submitted the matter on oral testimony alone would have taken far longer and would have been very confusing.
Here too care should be taken to assure accuracy as digital pictures are quite easy to manipulate and may even be faked. Videos should have a time indicator on them to assure accuracy and if photos are introduced you may want to use old-fashioned film as they are less susceptible to manipulation than digital techniques.

3. **Graphs and charts.** In appropriate cases these can be very effective and very educational for the arbitrator. In one case involving overtime usage a chart was in fact the best evidence of the pattern involved in the case. In one other case, the use of a chart to show which days were missed by the grievant who was being discharged was also very useful.

**OBJECTIONS IN GENERAL**

Obviously, there are many possibilities for objections and some objections may have multiple reasons. It is possible to object both to lack of foundation and to hearsay in the same question depending on what’s asked. If, however you feel that the witness does not have the requisite knowledge for the testimony, object on that basis.

A. **Why object?** As should be pretty clear by now, most arbitrators are going to let the evidence in anyway and give it whatever weight he or she feels is appropriate under the circumstances. Formalized objections on the basis that the evidence violates some formal rule of evidence is likely not going to keep the evidence out but may well focus in the arbitrator’s mind the suspect nature of the evidence seeking to be introduced. Under those circumstances it may be a good idea to interpose an objection to point out to the arbitrator that this evidence does not have much probative value.

It may also be advisable to object if you think the answer, even to a non-objectionable question, may hurt you. It may disrupt the flow or, if on cross examination, it may call attention to your witness to be careful about this answer.

Object if you feel the witness’ answer may be harmful or if you feel it will be unduly prejudicial. Many times, advocates seek to slip in character assassination to the evidence; pay careful attention to this and object if you feel it crosses the line.

Don’t object if you don’t think the objection is going to do anything or if it is clear that the arbitrator will admit the evidence anyway. This delays the hearing and may undercut your ability to object on a truly important point later on. Don’t cry wolf too much.

B. **When to object.** Objections should be made after the question is raised but before the answer. This is sometimes hard to do but should be done whenever possible. Advocates should prepare their witnesses for the possibility that an objection will be raised and that they should wait until there has been a ruling on the objection before continuing on with the answer.

Sometimes a witness goes beyond the scope of the question and starts adding things in. Advocates should caution their witnesses against that. You can usually raise an objection during the witness’ answer if that happens and the witness is not responding to the actual question posed to him/her. Witnesses also start talking even when there is no question pending. While this may not call for a formal objection, if your witnesses starts talking without a question pending, admonish the witness that there is no question pending and to wait until there is.

People tend to hate “dead air time” and are used to watching TV where there is generally never dead air so they just start talking. This is dangerous. Prepare them for this (clever advocates sometimes shuffle papers during their examination just waiting for this to happen) and tell your witnesses to answer the question asked of them and not volunteer more.
Objections should be done carefully and not all the time. Object if the evidence is likely to be prejudicial to your case and if there are some grounds for the objection. On the other hand, objecting causes a red flag to go up in some cases and you may simply want to make the strategic decision to let something in without objection so as not to cause any undue suspicion about it.

C. Objections to probative value. Many times, the objection is really not based on lack of foundation, hearsay or other challenge to admissibility but rather to the probative value, or weight, of the evidence. These will most likely be overruled and the arbitrator will take the evidence.

Keep in mind that simply admitting the evidence does not equate with giving it controlling weight or any weight. It means only that it is one small piece of evidence on the record for the arbitrator to consider.

Arbitrations are decided on the evidence and the strength of advocacy. Your evidence must first support the elements you need to establish if you have the burden of proof. If you are defending then your advice must support your claim that the party with the burden has not met it.

Preparation is the key to that – make sure the evidence you have supports your case. As noted above, most are arbitrators tend to take the evidence and sift through it themselves and decide what is important and what is not. While objections may be overruled, they may well signal to the arbitrator that some evidence may not be important and should not be given much weight. To that extent an objection may be successful even if overruled.

As to when and why to object – the answer is always – it depends.

DISCIPLINE – JUST CAUSE GENERALLY

THE SEVEN TESTS—ARE THERE REALLY THAT MANY?—Maybe not

What follows is an outline of the types of tests used to determine just cause. Keep in mind that not every arbitrator uses them and, in fact, many do not. Virtually all arbitrators though will require a showing of notice to the employee of the rule allegedly violated or a showing that no “rule” is necessary because the conduct is so obviously contrary to workplace standards. You don’t really need a rule against bringing a weapon to work, threatening to kill someone at work or stealing workplace tools. As an example, using foul language may be intuitively prohibited in a hospital or elementary school, but may not be so obvious in a steel mill or a coal mine.

The “7 tests” used by some arbitrators derives from Arbitrator Carroll Daugherty who first articulated them in Grief Bros. Cooperage Corp., 42 LA 555) noted as follows:¹

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been notice oral or written communication of the rules and penalties to the employee.

¹ It should be noted that Arbitrator Daugherty was well versed in railroad arbitrations that are quite different from regular arbitrations. There the employer makes the initial determination of the facts and the question for the arbitrator in many cases is whether there is substantial evidence to support their finding. For that reason, the discussion about the investigation, i.e. questions 3, 4 and 5 are a little different in a public sector arbitration. The essential question is whether the investigation was done fairly or whether it was a “witch hunt” where the outcome was determined before the investigation even got started.
Note 3: A finding or lack of such communication does not in all cases require a “no” answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?

Note 1: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee’s “day in court” principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The Company’s investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee’s behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The Company’s investigation should include an inquiry into possible justification for the employee’s alleged rule violation.

4. Was the company’s investigation conducted fairly and objectively?

Note 1: At said investigation, the management official may be both “prosecutor” and ‘judge,’” but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management ‘judge’ question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
Note 1: It is not required that the evidence be conclusive or “beyond all reasonable doubt, but
the evidence must be truly substantial and not flimsy.

Note 2: The management ‘judge’ should actively search out witnesses and evidence, not just
passively take what participants or “volunteer” witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in
conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to,
determine whether the management “judge” originally had reasonable grounds for believing the
evidence presented to him by his own people.

6. Has the company applied its rules, orders and penalties evenhandedly and without
discrimination to all employees?

Note 1: A “no” answer to this question requires a finding of discrimination and warrants
negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to
apply them rigorously, the company may avoid a finding of discrimination by telling all employees
beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case
reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of
the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has
properly been found guilty of the same or other offenses a number of times in the past. (There is no
rule as to what number of previous offenses constitutes a “good,” a “fair,” or a “bad” record. Reasonable judgment thereon must be used.)

Note 2: An employee’s record of previous offenses may never be used to discover whether he
was guilty of the immediate or latest one. The only proper use of his record is to help determine the
severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records
provide the only proper basis for “discriminating” among them in the administration of discipline for
said offense. Thus, if employee A’s record is significantly better than those of employees B, C, and D,
the company may properly give a lighter punishment than it gives the others for the same offense; and
this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm “Yes” answers to all
the first six questions. Suppose further that the proven offense of the accused employee was a serious
one, such us drunkenness on the job; but the employee’s record had been previously unblemished over
a long, continued period of employment with the company. Should the company be held arbitrary and
unreasonable if it decided to discharge such an employee? The answer depends on all the
circumstances. But, as one of the country’s oldest arbitration agencies, the National Railroad
Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge causes, leniency
is the prerogative of the employer rather than of the arbitrator, and the latter is not supposed to
substitute his judgment in this area for that of the company unless there is compelling evidence that the
company abused its discretion. This is the rule, even though an arbitrator, if he had been the original
“trial judge,” might have imposed a lesser penalty. Actually, the arbitrator may be said in an important
sense to act us an appellate tribunal whose function is to discover whether the decision of the trial
tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the
penalty of dismissal for a really serious first offense does not in itself warrant a finding of company
unreasonableness.
Arbitrator Daugherty further qualified the significance of the answers with the following comments, a “no” answer to any one or more of the questions normally signifies that just and proper cause did not exist. In other words, such “no” means that the employer’s disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

At the end of the day no case ever contains all these elements as significant parts of the analysis – if it did it would never see the light of day and be settled. Usually only one or two of these elements comes into serious play.

Further, keep in mind that Arbitrator Daugherty was talking about cases under the Railway Labor Act and not “traditional” arbitration. Thus, some of the discussion about investigation may not apply.

Finally, most arbitrator do not use these tests religiously. Many require notice, an investigation that is free from evident bias, adequate proof of guilt of the offense, an analysis of disparate treatment and a reasonable penalty. This is an abridged version of the 7 tests but are in reality fewer than 7

Moreover, a “no” answer does not always equate with the reversal of the discipline. An investigation can be badly flawed and yet the grievance be denied if there is sufficient evidence to establish that the employee did the offense and that it was serious enough to warrant the penalty imposed.

SOME EXAMPLES OF DISCIPLINE - SERIOUS OFFENSES

This will be a brief survey of the more serious offenses that lead to employee discipline and many times to outright discharge – often time on a first offense even for long term employees. There are offenses that are generally regarded as so serious that progressive discipline need not be applied and will result in termination even for a first offense irrespective of length of service and prior record.

This will by no means be a review of all of them. Many “cardinal sins,” as they are sometimes called, may not be as serious in some places as in others. For example, smoking too close to the door of a department store may lead to discipline but probably not discharge on a first offense. Smoking too close to the door of a coal mine, oil refinery or a grain elevator might – that is, if they can find enough of the grievant after the explosion to fire him/her.

This topic will explore the burden of proof necessary to establish a case for discharge for a serious offense, provide definitions for what are serious offenses (depending on the nature of the conduct and the nature of the business or work environment) and the possible defenses to a charge of a serious offense.

WHAT'S A SERIOUS OFFENSE?

Obviously a “serious offense” is in the eye of the beholder and a safety violation could certainly be one given the right set of facts, while it could be minor and warranting only a warning in another. From its very inception the arbitration process has recognized that some behavior is so serious that it justifies termination without the need for prior discipline. As with most things in the world of arbitration, however, there is a necessary caveat. The reported cases generally show at least two cautionary comments are warranted.

First, societal and legal views can evolve, changing the perception of certain offenses. Second, because arbitration is an equitable forum, arbitrators have recognized circumstances where an otherwise dischargeable offense can be mitigated. See discussion of theft and drug charges below.
An initial question might well be whether the so-called “cardinal offense” is in a policy promulgated by the employer – and thus probably subject to the just cause analysis set forth above, or whether it is an agreed upon offense in the CBA that calls for a certain degree of penalty.

Many CBA’s have within them a “matrix’ of agreed upon penalties for certain offenses. This takes away a certain degree of discretion form an arbitrator and undercuts the full analysis of the whether the degree of discipline is warranted.

If the parties have agreed that a certain offense = discharge, the arbitrator has little power to change that absent something extremely compelling or evidence that the EE did not in fact commit the offense.

With respect to changed perspectives, during the early years of arbitration an employee who engaged in a physical altercation would not necessarily be terminated. Arbitrators tended to employ a broad definition of provocation as a defense, including the idea that “fighting words” could excuse the rough behavior of the shop floor. While these defenses remain viable, in today’s world their application has been narrowed.

Bringing a firearm to work was not always considered a dischargeable offense. In one case the employee brought a pistol to work after having a fight with his wife the night before. He believed that putting it in his locker at work was safer than having it in his house where someone could get at it during an argument. There was ample evidence in that matter that there were guns in the premises often. There was a company sponsored shooting team and employees would bring their guns to work to show them off. There was a rifle over the supervisor’s desk with a sign under it that read, “ask your questions carefully.”

The employee was reinstated because not only was there not actual rule against it, the evidence showed that there was no threat to anyone (the gun was unloaded and the employee had never made any threats to anyone) and there were guns flashed around this place all the time. The employee was reinstated.

That case would certainly be decided differently today given society’s very different attitudes towards weapons in the workplace and recent tragedies throughout the country – including in Minneapolis. See, IBEW #160 and Northern States Power, AAA #56 300 00024-96 (Jacobs 1996).

Some reasons for this modified approach can be traced to changes in the nature of the workforce, as well as the heightened attention to workplace violence issues. Arbitrators as a whole are simply less willing to tolerate fighting given societal views. Another area where arbitrators appear to have changed their approach is sexual harassment cases. Even after such harassment became illegal reported cases tended to excuse hostile environment claims as simply a part of the workplace culture. Today, however, arbitrators are far less tolerant of such behavior.

In addition, arbitrators appear to have taken a closer look at the traditionally dischargeable offenses. While there remains a presumption that discharge is an appropriate response to offenses such as theft, sabotage, falsification of records, drug use/distribution, and insubordination, arbitrators have developed a willingness to consider gradations of misconduct as well as a recognition that in some cases mitigation can play a role.

ARE THE CONSEQUENCES FOR OFFENSES IN THE CBA OR UNILATERALLY IMPLEMENTED?

If the offense is listed in the collective bargaining agreement as a “cardinal offense,” or similar designation, with a stated consequence, this will generally limit the arbitrator’s discretion as to whether to reduce or amend the penalty in the event there is a finding that the employee has indeed engaged in the prohibited conduct.
For example, if the contract lists a certain type of conduct as resulting in termination on the first offense the employer will generally have a much stronger argument that the arbitrator’s discretion is limited since the parties themselves have agreed that this conduct will result in discharge (or other stated penalty).

On the other hand, while a unilaterally promulgated employer rule may be clear and well understood, the union may still have a valid argument that a rule cannot overrule the provisions of the contract and that the analysis must still proceed on a just cause analysis. This will generally entail an examination of the appropriateness of the penalty as well. In that instance the arbitrator may well have more discretion to alter the penalty even if there is a finding that the employee engaged in serious misconduct.

In *Paperworkers v Misco*, 484 US 29, 126 LRRM 3113 (1987) the Supreme Court recognized the inherent power and discretion of an arbitrator to fashion a remedy, including reducing the degree of discipline where appropriate. The Court noted that, “normally an arbitrator is authorized to disagree with the sanction imposed for employee misconduct.” *Id* at 41-42 and 126 LRRM 3118.

In *Misco* the Court noted too that certain offenses listed did not automatically provide for discharge. Accordingly, the arbitrator was allowed to fashion a remedy based on the traditional factors used by many arbitrators to do so – i.e. length of service, prior record and underlying circumstances. See generally, Elkouri, 6th Ed at 953-962. See also, Daugherty’s 7th test of discipline above.

**OFFENSES CONSIDERED “CARDINAL SINS” IN ONE INDUSTRY BUT NOT OTHERS**

In some industries certain conduct is considered so serious that it warrants termination on a first offense. For example, many healthcare facilities will terminate someone who diverts drugs even if there is some sort of addictive process going on. The claim is that nurses and other healthcare workers who do this cannot be trusted to give good patient care and to be honest about charting and other documentation.

On the other hand, a teacher who takes home a pencil may well not face termination or even discipline since it is such a minor offense. This may however be a question of degree. Taking home a full case of copy paper might well be considered serious enough to warrant serious discipline or discharge.

In the grocery industry, theft of even as much as a single grape may well lead to termination simply because one leads to two, two leads to a whole bunch of grapes and eventually the camel’s nose has slipped under the door. This may well be due to the nature of the business and the increase needs for certain rules to be in place. Some businesses that deal with large amounts of cash, i.e. bank tellers, cashiers, bar tenders etc. may well be subject to very strict cash management procedures due to the need to be extra vigilant about cash management and prevention of theft – even of very small amounts of cash.

Notice of such a rule is key though and employers must be able to demonstrate that the rules are clearly stated and enforced.

Both parties need to be able to explain why such strict rules are in place and what the consequences are of violating them. For example, violation of a no smoking rule in an office, while offensive is not usually life threatening, whereas such conduct in a mine, grain elevator or oil refinery obviously does.

Parties should also be prepared to provide evidence of any discussions between the parties and between management and the affected employees about certain conduct. This can be very valuable information regarding notice of the rule and of the consequences of violating it.
SOME TYPES OF SERIOUS OFFENSES

A. THEFT

Few things will get a person fired faster than stealing something from the employer or from one of the employer’s customers. Here arbitrators may require a slightly higher amount of proof and perhaps more direct evidence than in other types of cases. Termination for theft may not only get one fired from this job but may well stigmatize the person making it difficult if not impossible to get another job in that industry.

A bank teller or a cashier at a department store who pilfers money from the drawer will almost certainly be fired but may also have a difficult time finding a job elsewhere once the potential employers learn of the first offense.

Likewise, a nurse who “diverts” medication, which is a fancy name for theft, may also have a more difficult time finding a job later. Although in some such cases the drug theft can be traced to addiction issues and provides at least a palpable excuse for that conduct.

SOME EXAMPLES:

THE CASE OF THE STOLEN FIREWORKS

In one case a grievant was discharged for the theft of fireworks from a customer’s warehouse. He had access to the facility with a key and was therefore in a position of considerable trust by both the Employer and the customer. He delivered certain product and when the customer went back to the warehouse, he noticed the fireworks missing. They checked the videotape that showed the grievant carrying product in and taking empty boxes and other material out to clear the way for the product.

The tape clearly showed him taking something that looked like the fireworks but the tape was not entirely clear. Had the employer rested its case entirely on the video evidence the case may have been decided differently. They did however bring in an actual fireworks box that showed quite convincingly that what the grievant was carrying out to his truck was in fact one of those boxes.

Moral of story: if a picture is worth a thousand words, being there or viewing the actual site or item in question is worth a thousand pictures.

THE CASE OF THE “SALTED” CASH DRAWER

In another case the allegation was very straightforward: the grievant was accused of stealing cash from the parking receipts drawer and was fired. The employer, in response to an audit that strongly suggested randomly checking the tellers’ cash drawers to make sure they were honest, began “salting” the cash drawers of the attendants. This was done randomly over the course of several months and to all of the tellers at some point.

The process was that the tellers were to reconcile their register tape with the cash in the drawer at the end of the shift noting any underages or overages. It was not uncommon that the receipts would not match exactly due to the heavy volume of traffic through the parking ramp and the cash nature of the business.

In the instances involving the grievant, the Employer added small amounts of cash to the drawer without the grievant’s knowledge; sometimes at the beginning and sometimes in the middle of the shift. In each case the drawer was off by the exact amount the drawer was “salted.” The Union argued that there were circumstances that could have led to someone else being responsible for that.
For that to happen however, a wide range of things and a very elaborate conspiracy involving union and non-union management people would have had to occur. The reasonable inferences to be drawn from the actual evidence was that the grievant was guilty of the theft and the discharge was sustained.

The employer also successfully argued that due to the nature of the business, involving large amounts of small bills in cash, the theft of even very small amounts of money, i.e. under 20 dollars, justified a loss of trust and could not be tolerated.

Some employers have established a margin of error rule over time that accounts for small discrepancies in the cash receipts versus the cash register tape. Tollbooth operators are sometimes subject to this rule that allows for some slippage in the system due to the large number of transactions and the nature of the operation. If a teller goes too far outside of this margin however, the implication is that something is amiss. Depending on how far amiss it is, theft is sometimes charged or at least lax compliance with cash management procedures. Also, depending on the rule, this failure to follow those procedures could be the basis for discipline as well.

THE CASE OF THE “STOLEN” $0.29 CLEANING BRUSH

In another case, the employee went it not the tool crib and took a small wooden brush about the size of a toothbrush and put it in his pocket. He claimed he simply forgot about it and when he walked out to the shop for the day the security guard noticed it and stopped him. He was cared with theft of tools and fired him.

The union argued that there was no true intent to steal the brush and that it was almost inconsequential. They analogized it to a schoolteacher taking home a few pencils or a notebook from school. There was no absolute rule against taking literally anything – just a rule against “theft of tool.” There was also a provision in the rule book that said it was a serious offense punishable “up to and including” discharge.” Thus, there was no strict requirement to terminate even upon proof of guilt. The employee was reinstated.

Advocates should remember that that intent is a required element of theft. Employers should devote some attention to that issue in its investigation and presentation of evidence. Did the employee know he/she had the item? Was there a clear rule against taking it – or as sometimes the case – is there a practice of people taking small items or what is perceived to be “trash” home without consequence?

Union, may want to focus on whether the employee actually understood that the unauthorized removal of a particular item was prohibited. In some cases, the answer will be obvious – taking a stock item off the shelf and pacing it a purse or lunchbox is compelling evidence. Picking up a large amount of what looks like junk that happens to contain something valuable may not be unless there is evidence the employee surreptitiously placed it there to conceal the fact, he was taking it.

These cases are very fact specific but a very thorough investigation is warranted by both sides in such a case.

Don’t assume things and don’t give up too early on a case one side thinks is a slam-dunk without examining all angles.

THE CASE OF THE FROZEN SHAMPOO

In one case the employee was a manager at a large grocery store. One day a vendor came to her with a case of shampoo that had been in the trunk of his car but had gotten frozen in the cold. These could not be sold legally even though the bottles were intact and the product was still “good.” He left it with her and she had intended to donate it to a local food shelf.
A somewhat overzealous security guard saw the case sitting on the corner of her desk and decided to “stake her out” to see what she would do with the shampoo. He did not know how the shampoo got there or the back-story behind it. She left with it she was stopped and fired for theft.

The union successfully argued that this was not truly “theft” since the product could not have been sold in any event. Further, the product never “belonged” to the employer since it was left there by a sales rep for the purpose of donating it to the food shelf. Further, this was not “waste” created by the employee’s actions. Finally, there was a woefully inadequate investigation that would have discovered readily that the product was given to her rather than to the employer for sale. The employee was reinstated but without back pay since she did not report the “gift” to store management as required. *UFCW and Cub Foods*, (unreported) no FMCS file # (Jacobs 1999)

**FRAUD AND INTENTIONAL MISREPRESENTATION**

Lying on a job application or fraudulently filling out a form for overtime is also something considered very serious and is typically treated very seriously. Employers argue that honesty is in virtually all cases at the very heart of the business and that it must be able to rely on the integrity and honesty of its employees. Filling out a form, like an application for employment, or a form for pay or a form to a government agency, severely undercuts that necessary assumption. Employees who cannot be counted on to be honest or who may “fudge” such a form cannot be allowed to stay.

Unions may argue though that some statements may be subject to interrelation or that the “fraud” was a simple mistake or a judgmental error and should not be treated as immediately dischargeable. Those will of course depend very much on the facts of each case.

In one case a deputy sheriff was accused of fraudulently filling out his time sheets. There was little question that the time sheets were incorrect and that it resulted in pay for time not worked. The Sheriff argued that honesty is more than crucial in law enforcement and that a sworn office of the law cannot be allowed to make these kinds of fraudulent entries on a form for pay.

The union argued that the deputy suffered from PTSD due to an incident of a few years before and that this was the reason or the incorrect entries. The evidence showed that the deputy was able to fill out every other form he was required to submit, including reports for arrests and traffic stops, just fine and that there was in fact some reason for the deputy to be leaving early and trying to get paid for it. See, *Mower County and LELS*, State of Minnesota BMS CASE #11-PA-0560 (Jacobs 2011).3

Fraudulently punching in another employee’s time card is also generally regarded as a cardinal offense and is frankly akin to theft of time. Here the question may well be whether it was really done and who did it. In one case an employee was accused of punching in her children’s time cards. She worked as a full-time employee for a college and the kids were student/employees. At the hearing though the son admitted that he in fact punched in his sister’s time cards and that he frequently cut class to punch in. Sometimes he would work after that and sometimes not. *University of St. Thomas and IBT #120*, 124 LA 1468 (Jacobs 2008). Note too that this was credible since the son lost his scholarship as the result of this admission and was clearly a statement against interest.

This was a question of credibility and on those facts the mother was reinstated since her son lost his scholarship and was expelled from school as the result of his testimony.

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2 Many employers have a rule against taking home “waste” since it encourages creating waste.

3 The deputy was also found to be sleeping on duty multiple times per night and multiple times per week, which of course contributed to his termination. However, the fraudulent time sheets were also a finding of a serious offense, especially for law enforcement officer.
Lying in an official police report is especially troublesome in law enforcement and may get an officer on the dreaded Brady Giglio list. In one case an officer was asked point blank where he was on a certain day after he had been specifically directed to be at work. He then lied to his superiors about where he had been. The discharge was upheld. Montana Public Employees and Montana Dep’t of Justice – Highway Patrol (2017).

Brady Giglio issues in law enforcement – In Brady v Maryland, 373 U.S. 83 (1963) the U.S. Supreme Court held that the prosecution must disclose any evidence that might exonerate the defendant. In Giglio v United States, 40 U.S. 10 (1972) the Court held that the failure to inform the jury that a witness had been promised immunity in exchange for testimony was a violation of the due process clause.

Over the course of time these holdings have been “extended” to include requiring prosecutors to disclose any evidence that the arresting officer(s) has ever been untruthful in an official capacity in the past. For an officer to be on the “Brady Giglio List” maintained by prosecutors around the country can be a real hindrance to that officer’s ability to testify in court in the future as it could result in a finding of “reasonable doubt.” While the Brady Giglio list is not necessarily the kiss of death for a law enforcement officer’s career, (otherwise why would there even be a list,) it is a problem.

Arbitrators do not have the power to alert a prosecutor’s decision to place an officer on the Brady Giglio list and that fact can be significant in any discipline case involving a law enforcement officer. 4

INTENTIONAL DESTRUCTION OF PROPERTY

Somewhat similar in intent is the intentional destruction of employer property. Here the question may well focus on intent versus simple carelessness or inattentiveness. The facts will be crucial to the determination of these cases.

Patterns of damage may well be important. Thus, an employee who is always breaking things may well be subject to the charge that this is not an accident but part of a plan to get out of doing work or outright sabotage of the employer’s business. Surveillance tapes and other forensic evidence may be very important in determining this.

THE CASE OF THE ANNOYING LOCKOUT DEVICE

On one case a bus driver was annoyed by a lockout device that prevented the bus from moving when the back door was still open. He felt that this slowed him down and that he could still see when people were clear of the door after they had gotten off. The employer had installed the devices to prevent accidents and to make sure the bus did not move while people were still in the door. Here was however a slight, perhaps 1 second, delay after the door shut to allow the bus to move.

This driver’s bus consistently had the lockout device either broken or disabled virtually after every run he took. This was before cameras were stalled on the buses, so the bus company made sure the device worked before he took his bus out. Sure enough, it was broken when he returned.

4 The list has been extended to statements by law enforcement officers that could be considered racist or inappropriate. See, Rice County MN and Deputy Thomas McBroom, Minnesota BMS CASE #19-PA-0690 (Jacobs 2018). There the deputy posted messages on social media that were disparaging of a woman who had received a settlement after her fiancé was shot by a police officer. The comments accuser essentially of being a crack addict and were simply insulting. He was placed on the County’s Brady Giglio list as the result of these statements. His demotion from Sergeant to deputy was upheld by the veteran’s hearing officer and by the District Court as well. See Thomas McBroom v County of Rice, Third Judicial District Court # 66-CV-18-2288 (2019).
The employer argued that this could not have happened without someone opening the cover over the door and disabling the device. The driver denied it, but the circumstantial evidence was too compelling and he was discharged.

**DRUG AND ALCOHOL CASES**

Many safety sensitive employers have very strict rules regarding use of drugs both on and off-duty. These cases will depend on the nature of the business and how serious this is in the particular industry. Also, many states have rules requiring a “second chance” in the event the employee submits to treatment for addiction and demonstrates sobriety.

Elkouri notes that some Courts are increasingly hostile to drug and alcohol abuse cases yet the Court in *Eastern Assoc. Coal v Mine Workers*, 531 US 57, 165 LRRM 2865 (2000) rejected a claim that the arbitrator’s award reinstating a worker who twice tested positive for marijuana.

If the CBA calls for termination or a stated penalty for testing positive for drugs, the arbitrator may have limited discretion as to what to do in the event there is sufficient evidence of inappropriate drug use or impairment.

Is it stated as a “cardinal offense” in the CBA? If so, the sole question may be whether there was drug use or impairment while at work. Safety sensitive industries such as airlines, mines, pipeline, law enforcement, driving jobs may have a far greater penalty than other industries. See discussion of marijuana below.

In one case the grievant tested positive for alcohol but exhibited no signs of impairment at all. He was an alcoholic but even the police officers who tested him did not arrest or cite him for drunk driving even though he had driven to a work site. He also successfully completed alcohol treatment and posed no threat to the public. See, *Gas Workers #340 and Centerpointe Energy*, FMCS 110911-58672-3 (Jacobs 2012). There was also a Minnesota state statute requiring that employees who undergo treatment must be given a “second chance.”

In another, a worker tested positive for traces of cocaine in his system. After a lengthy hearing in which expert witnesses testified on both sides, it was shown that the evidence of cocaine, which was found in his hair after testing of strands of hair, could well have been due to second exposure and not due to his use of it. See, *Marathon Ashland Oil Co. and IBT #120*, FMCS 020612-11379-7 (Jacobs 2004).

Obviously, cases of this nature will be very fact specific.

**ZERO TOLERANCE POLICIES FOR DRUG USE – SEE MARIJUANA DISCUSSION**

Many arbitrators have grappled with these zero tolerance policies. Employers are fond of them and want to send a clear message that drug use will not be tolerated. Yet many such policies provide for discipline “up to and including” discharge. Is that really “zero tolerance?” Maybe for discipline, but perhaps not an automatic discharge as many employers argue. Many arbitrators have held that they are not truly zero-tolerance and are thus subject to the just cause provisions of the CBA.

Employer should still be prepared to establish the seriousness of the conduct and the possible consequences and be further prepared to show a full just cause analysis for these cases. It may not be enough to simply assert that the employee tested positive and leave it at that.

See, *Newspaper Agency Corp. and Salt Lake City Mailers*, 119 LA 926 (McCurdy 2005). The arbitrator ruled that a zero-tolerance policy was not equal to the just cause provision of the CBA where an employee tested positive for pain medications prescribed for his wife and where the parties had frequently discussed the policy during joint meetings. The policy was not in the CBA and the employee was reinstated.
See also Gasworkers Union #340 and Centerpointe Energy, FMCS CASE #110911-58672-3 (Jacobs 2012). The employee was an alcoholic and had a high tolerance for it. He drank the day before work and went to work the next day feeling fine. He was able to perform several technical tasks during the morning but a customer smelled alcohol on his breathe and called police who administered a PBT test and determined that the employee was over the legal limit to drive a vehicle. For whatever reason they did not arrest him because he seemed so sober.

The Company fired him since he was in a safety sensitive position and even though there was a 25-year-old provision in the CBA that required termination for being intoxicated on the job.

Since that provision was inserted in the CBA however there were others that required that the employee be reinstated if he/she went through appropriate treatment, which he did.

The employee was reinstated but without back pay since his treatment did not end until shortly before the hearing. This was a very fact specific case but demonstrates the difficulty with some of these cases.

**SLEEPING ON THE JOB -**

Generally, sleeping on duty is generally regarded as warranting severe discipline or even discharge. In one case, the employee had been specifically told to watch a patient during the overnight hours and fell asleep while doing so. The employee’s job was to be a “sitter” for a patient with a very unstable condition to watch them and immediately report any changes in condition. While sitting in the room overnight, she fell asleep on two occasions and was caught by a night nurse who happened to walk in while the employee was dozing. Discharge was sustained. See, Fairview University Hospital and SEIU #113, FMCS CASE # 050425-55383-7 (Jacobs 2007). There, the employee’s job was specifically to stay awake and watch a patient. Dozing off was not an option and it was clear that the grievant was sleeping and trying to hide her eyes with dark glasses.

In another case, it was clear that the employee was sleeping on the job, falsifying time records and was “nesting.” In other words, finding a secret place to hide and then sleep on the job. Northern Metal Recycling and UE #1139, FMCS 1755712 (Jacobs 2017). “Nesting” is sometimes used as a strong indication of intentional loafing or sleeping as opposed to simply dozing off due to fatigue – see below.

In another, a deputy sheriff was discharged for admitting that he frequently slept during his shifts while on remote locations throughout the County. See also Mower County and LELS, State of Minnesota BMS CASE #11-PA-0560 (Jacobs 2011). He would go to quiet locations in rural areas and simply doze off. This too had a sense of “nesting” in order to sleep while on duty.

In LELS and Ramsey County, BMS Case #17-PA-0922 (Jacobs 2018) a deputy was demoted for sleeping on the job. His demotion was reduced to a 3-day suspension where it was clear that he was dozing off after working overtime in almost every day for several weeks in a row and was in a secure area out of the view of inmates or the public.

In Steelworkers #1930-12 and Phillips Mfg., FMCS 190402-0578 (Jacobs 1029) the employee was observed sitting on his equipment with it shut off with his head back. He had some medical issues that caused him to be drowsy that day but when the supervisor said something to him, he immediately “awoke.” He was in plain sight and there was no evidence of “nesting” or hiding. The issue was whether the employee was truly “sleeping” or resting his eyes due to a severe headache. On that unique record it was found that it was the latter. The employee was reinstated.
Lax enforcement can be an issue. In a case where the employer had not discharged an employee for falling asleep only a few months before the incident in question, the employee was reinstated for falling asleep in a recycling facility. See, *Great West Recycling and IUOE #49, FMCS CASE # 101001-60281-3 Jacobs 2011*. The case was decided on a lax enforcement theory since the employer had suspended an employee for virtually the same conduct only months before and had not taken the necessary steps to notify the employees and the union that such conduct would now result in discharge. See also, *Simcala v USW #8538, 112 LA 1121 (Lurie 1999)*.

**INSUBORDINATION**

**INTRODUCTION AND SCOPE OF THE TOPIC**

Virtually everyone involved in industrial society knows that what Harry Shulman said about the world of labor relations is true: “An industrial plant is not a debating society.” *Ford Motor Co. and UAW, 3 LA 779, 781 (1944)*. Indeed, it is not, at least not generally, and when a supervisor issues an order there is a legitimate expectation that it will be obeyed promptly. On the other hand, is it truly insubordination to simply question a directive or to engage in discussion about how to do the work?

The commentators make it clear that “An employee who disagrees with a work order or work rule normally must obey the work order or rule and challenge its legitimacy through the grievance and arbitration procedure or other channels. Failure to do so may constitute insubordination.” Like any other hierarchical organization, businesses require a chain of command if they are to operate efficiently. See, *Common Law of the Workplace*, (BNA 2005) St. Antoine, Section 6.8 @ page 188. While there are exceptions, the general rule is “obey now and grieve later.” Failure to do so may subject the person to discipline.

We will also explore the elements of insubordination and what exceptions exist to the “obey now, grieve later” rule. Certainly, too there are many instances where legitimate disagreements arise or where there exist exceptions to this rule. In these cases, certain conduct that may at first blush appear insubordinate may not be at all.

Clearly, there is a risk inherent in refusing to do the work. If the employee is right and the contract really does prohibit it, they may well be justified and presumably will be made whole for any losses. There is a risk even if the employee is right though due to the “obey now grieve later” rule.

We will discuss two basic types of insubordination: 1. Refusal to comply with the reasonable order of Management and the possible exceptions to that rule; and, 2. Disrespectful or offensive behaviors that show disrespect for managers or the employer’s interests. Note we will not go into the realm of internet usage or off-duty comments and will leave that for another discussion but will explore certain types of comments and behavior that many would regard as insubordination even though it does not involve the outright refusal to comply with a legitimate order of management.

**THE ELEMENTS OF INSUBORDINATION**

**DEFINITION:**

Black's Law Dictionary describes insubordination as “a willful disregard of express or implied directions of the employer and refusal to obey reasonable orders.” In more common terms, insubordination is the willful disobedience of a legitimate order from a superior who is authorized to issue an order.

Also, there is the notion of disrespectful behavior towards a supervisor that goes beyond mere refusal to do the work. Using profanity towards a supervisor, raising one’s voice, insulting them or undercutting their authority may in some circumstances be disciplinable as insubordination depending on what happened. Thus, there is an element of insubordination that transcends the refusal to comply with a reasonable order or directive.
WHO IS A SUPERIOR AND AUTHORIZED TO ISSUE ORDERS TO THE GRIEVANT?

Obviously if the employee’s direct supervisor issues an order the employee knows that he/she must obey now and grieve later unless there is a relatively clear exception to that general rule. There is however some question about the authority of some employees, i.e. when a co-worker is elevated to lead person status. Employees do not need accept a bald statement of authority from a co-worker or stranger to the plant without being placed on actual or constructive notice of that authority by a person recognized as the employee's superior. *Railway Carmen and OPEIU, Local 320, 77 LA 694* (Thornell, 1981). See also, *Washington True Solutions and PACE, Local 4-9477, 120 LA 285* (Nicholas, 2004) (where a private security guard gave an order to an employee who questioned the authority of the guard to issue the order).

Employers should have a procedure in place to advise employees of increases in authority, situations where out-of-department supervisors cover for other employees or where test programs are introduced by upper management or outsiders.

In one such case the employer brought in outside trainers to develop a new production system and told the employees this would be happening. The arbitrator found that the Company had adequately notified the employees that these individuals had authority to direct the workforce and that the grievant was repeatedly told by his direct supervisor to follow the direction of the trainers. The grievant refused. His subsequent discharge was sustained. See, *Red Wing Shoe Co. and UFCW #527, FMCS CASE # 05-51578* (Jacobs 2005).

Further there is the question of whether security guards have the authority to search the employees or their possessions. Such authority should be the result of a clearly stated notice to the employees of who these people are, especially if they are not also employees of the same employer, why they are there and what the parameters of the search will be. Otherwise, an employee might legitimately believe that the plant security guard is there to guard against unwanted intruders but are not authorized to conduct actual searches of their person or their bags/purses or vehicles.

The facts will vary greatly but there should ideally be a clear notice to the employees that the security guards have certain authority and a clear statement by the guard at the time of the search that they are acting pursuant to the authority given to them by the employer. Ideally too there should be a clear statement of the consequences of a refusal to submit to the request for a search. As the facts get further away from that the murkier it gets in terms of the possible result.

WAS THERE AN ORDER, A SUGGESTION OR SOMETHING THE EMPLOYEE “OUGHT TO HAVE KNOWN?”

There is no need to use some magic language or some phrase such as “I am giving you a direct order” and the fact of a direct order may be inferred or concluded from the totality of circumstances. See, e.g. *Plymouth Tube Co. and IAMAW, Local 1239, 118 LA 1660, 1663* (Speroff, 2003); *Coshocton County Engineer and AFSCME, Ohio Council 6, Local 343, 98 LA 1145* (Murphy, 1991). A supervisor giving a memo to an employee saying simply, “this is for you” is notice enough that the employee should read the memo and comply with it. For the employee to say later that he wasn’t aware there was anything in it that he needed to do under those circumstances may well be dismissed as disingenuous.

On the other hand, if the order is so vague or stated in uncertain terms as to imply that it was a request rather than an order the arbitrator may not be persuaded that there really was an order. This will depend on the facts of each case but if for example there is a statement to do something “whenever you get around to it” that may well not be specific enough to sustain discipline because the employee did not do it that day.
Also, there may well be legitimate practical reasons for failure to comply such as lack of parts or other delay. See, *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002). There the employee was disciplined in part for failure to promptly respond to a page from his supervisor. The employee however was on an intercampus bus and was not able to respond immediately to it and was not aware of the urgency of it from the short message he received. He would have had to get off the bus and make a phone call from a pay phone thus missing the bus. He would then have had to wait another 15 minutes or more to catch another bus. Knowing that he would be seeing the supervisor in 5 minutes or so when he got off the bus at the other end he opted to wait, believing that he was saving time.

Obviously, the order must be reasonable both in terms of the employee’s ability to perform it and in terms of time. See, *Montgomery County Board and UFCW # 400*, 99 LA 111 (Hockenberry 1992).

The question is always: How clear was the order and how clear was it made that it was in fact a direct order? If the supervisor is equivocal about it says something like, “I don’t give orders” the less clear this becomes. Note that there may in fact be language differences that get in the way here. Statements like – I’d prefer you not do it that way may mean very different things in New York than they do in Minneapolis. There may also be a lack of clarity in translation if the employee and the supervisor do not speak the same language.

In one case, the employer asserted that the employee, a teacher, “should have known better,” but there was no indication that a directive or policy was ever communicated to her.

See, *Joliet School District and Hallie Spokie Luoma*, (Jacobs 2020). There the teacher attended a meeting that was billed as an open opportunity to discuss almost anything about the education of the children or matters pertaining to the District. At this meeting the teacher asked if a special education child was supposed to have an aide with him at all times. There was no directive given to her regarding whether she could make that statement at this meeting and some of the aides took umbrage believing that the teacher was criticizing them.

In fact, the child was supposed to have an aide with him and the parent was understandably upset to learn that he didn’t – even though there was an IEP agreement reached only weeks before requiring that he have an aide with him. The teacher was directed to speak only to the special education director thereafter about special education students – which she did. There was compliance with the order. On those facts there was the District failed to establish insubordination.

Further, an order must be given before the acts complained of. In that same case the teacher asked if she could involve parents in the decision to change the hours of the gyms. She was told she could not and she again complied with that order. There was on those facts no basis for an insubordination charge as there was compliance with the order after it was given and no evidence that she was ever given that directive. Further there was no evidence that the teacher actually did talk to the parents anyway but simply asked if she could.

Bottom Line, be clear and if there is any doubt, if you are the employer, make sure the employee understands it. If you are the Union, look for ways to undercut this by arguing that the way in which this was communicated did not look or sound like a direct order that would get the employee fired if they did not do something right away.

Finally, is it truly insubordination to fail to comply with clear work directives that are in the nature of standing orders? For example, if the standing rule is that clean up must occur before the person can leave the workstation, is it insubordination to fail to do so?
It may be other things for sure and even insubordination, but there may be a legitimate reason for the failure to perform the required work. It may make a difference if insubordination is regarded as a so-called cardinal offense that will result in far higher penalties automatically as opposed to other more general offenses that are subject to a progressive discipline scheme.

**WAS THERE A REFUSAL OF THE ORDER?**

The easy case is one where the supervisor tells the employee to do something and the response is “no I won’t because (fill in the blank).” While there may well be legitimate reasons not to perform due to some practical reason or the job is unsafe, at least in this circumstance there is a clear refusal to perform the job. What if however, the employee says, “sure, I’ll do it” but then doesn’t? Slow performance or performance in such an inept manner as to require constant supervision may well constitute insubordination. See, *National Carbide Co. and Firemen and Oilers*, #320, 24 LA 804 (Warns 1955). See also, *Red Wing Shoe Co. and UFCW #527*, FMCS CASE # 05-51578 (Jacobs 2005), where the employee indicated that he might comply, but that he would have to be specifically directed to move by his direct supervisor every time he had to move on the production line.

Refusals can take various forms. Obviously the easiest to ferret out is the one that says simply “I won’t.” If the employee says, “I can’t because I don’t know how” there may be some dispute about that. The employee may say that he/she cannot because they are unable to do the job. The employer may well believe this is a subterfuge and must therefore produce facts to indicate that what the employee says was not true. Evidence of training or other activities the employee was engaged in earlier may well be very useful evidence to show that.

On the other hand, evidence of lack of training or of some physical or other limitation may also be very useful to show that there was not true insubordination but a good faith statement of inability to perform.

The facts surrounding the refusal will vary greatly and the evidence taken as a whole must be reviewed to determine if there really was a refusal to perform or if the employee was simply indicating they were not able to do the job for some legitimate reason.

**WERE THE CONSEQUENCES OF THE REFUSAL MADE KNOWN TO THE EMPLOYEE?**

Most commentators indicate that there should ideally be a clear notice to the employee of the consequences of the refusal. There is no magic language but the closer the facts get to a clear pronouncement that the employee is being insubordinate and is refusing a direct order and may be disciplined for it, the closer it gets to meeting the requirements of this notice.

On the one hand this seems fairly obvious. If a supervisor comes to an employee and tells that employee to do something, the employee should generally know that refusal may carry with it potentially serious consequences. Some arbitrators have struggled with this one and one even indicated that management should have “repeated what would inevitably happen to him [the grievant] if he insisted upon disobeying the order so that there could be no doubt in anyone’s mind that the grievant was refusing with full knowledge of the consequence.” *GCIU District Council 2 and Westvaco*, 89-1 ARB 8018 @ 3066 (Koven 1988).

On the other hand, labor relations is not generally practiced by ambush. Inherent in the notion of employee discipline is the concept of notice of the fact that something is unacceptable and that doing it will result in discipline of some sort. Employers cannot tolerate and do not generally deserve last minute refusals to perform work and employees do not generally deserve instantaneous discharge for every possible affront to authority or every time they question an order.

In many cases, there is a discourse about job performance and supervisors and employees do in fact engage in some mild negotiation as a practical matter.
In cases where discipline has been reduced or overturned for lack of notice it is the employee’s uncertainty that he or she is engaging in behavior that will get them fired that is the deciding factor. Telling an employee he is making a “career choice” may not necessarily constitute clear warning that they are about to be fired. See, King Soopers and UFCW #7, 118 LA 1350 (Watkins 2002).

This too will depend on the facts of each case. An employee who is told to do something and responds with a terse negative retort may be subject to discipline without some additional statement by the supervisor. See e.g. Leggett and Platt and IUE #743 120 LA 122 (Heekin 2004) and Westfield Tanning and Westan Employees Union, 120 LA 412 (O’Connor 2004).

In one case the contract required that a union be called to make it clear to the affected employee that the supervisor was issuing a direct order. In that instance, the supervisor issued an order, which the grievant refused to perform, and then followed the contract by calling a steward for the purpose of issuing the order. He then did so and explained that the grievant could be fired if he continued to refuse. The grievant still refused. Under those facts the insubordination resulted in the grievant’s discharge. See, Red Wing Shoe Co. and UFCW #527, FMCS case # 05-51578 (Jacobs 2005).

**IS THIS INSUBORDINATION OR A GOOD FAITH DISAGREEMENT ABOUT HOW TO DO THE WORK?**

Incumbent in the notion of insubordination is a refusal to perform the work. It does not always have to be stated in terms of “no I won’t do it,” or similar words, but can also be the refusal to do it in a certain way. This too very much depends on the facts. Here too employees have a far better chance of prevailing if they can establish that they were more than willing to perform the job but that they determined that it should be done in a certain way that may be somewhat different from the way the supervisor wanted it or that they made a judgment about a job the supervisor did not like.

In University of Chicago v Carpenters and Joiners Local 215, FMCS case # 01-0554 (Jacobs 2002) the grievant was directed to build a crate to ship a large freezer. The employee was a long-time employee who clearly knew how to build crates and had done so many times before. He determined that the crate should be of a certain size and configuration and started to build the crate in that way. The order had been only to “build a crate” for the freezer. When the supervisor saw it, an argument ensued over how to best construct it. The insubordination charge was overturned on those somewhat unique facts.

In another case, the employee was directed to saw off part of a wall on a building under construction. The request was made by phone from a supervisor that was not on the job site and was not aware of the conditions there or the difficulties faced by the work crew. Again, a disagreement ensued over the phone that culminated with the employee hanging up on the supervisor. As will be discussed more below, the insubordination charge for that was sustained and the employee was disciplined for that. The main charge, i.e. that he did not perform the work as directed, was overturned on similar grounds. The employee was a long-time employee with many years of experience doing what he had been directed to do.

There was no refusal to do the work, only a disagreement as to how best to do it. The employee was required to cut off part of a concrete wall with a concrete saw in a bucket loader. He was directed by a supervisor who was 150 miles away and unfamiliar with the situation. The two got into a heated exchange over how best to perform the work safely. As it turned out the supervisor had no idea what was going on and, under those circumstances the grievant was successful in showing that indeed his was the best, and safest, way to do the job. See, Fabcon and Bricklayers and Allied Craftworkers Local #1, FMCS case # 05-03238 (Jacobs 2005).

Note that there was an element of the safety exception to this matter that will be discussed below; the issue was how to do the job in the safest way possible.
It should not be assumed that the employee should get to disagree all the time with supervision. Highly relevant in these situations was the fact that the grievants were long time very experience employees who knew exactly what they were doing and that the supervisors, while shown to be competent people, were not there when the actual work was being performed. Also, there was no refusal to do the work and the grievants were shown to be putting forth a good faith effort to do what had been directed either building a crate or sawing off part of a wall.

Employees still take some risk in disagreeing with the supervisor. As noted at the outset, the industrial plant is not a debating society and if the employee’s supervisor is there and is specifically directing the work, the fact that the employee’s ideas are “better” may not fly.

**IS THIS INSUBORDINATION OR IS IT AN EMPLOYEE MERELY ASKING QUESTIONS THE EMPLOYER DOESN’T WANT TO ANSWER?**

In one case the employee was accused of insubordination and being disruptive at a meeting creating poor morale and disrespectful behavior towards her co-workers and her supervisors for her actions at a meeting called to discuss certain problems and possible policy changes in the department.

The meeting was called for the purpose of providing feedback from the employees to find out why there were errors being made in the billing system and was by all accounts “free flowing” since there was no set agenda. In fact, the supervisor started the meeting by saying that he wanted honest feedback about this problem and solicited suggestions from those present about why the problem existed and how to fix it, which is exactly what he got.

At some point in the meeting the grievant, having been asked for her input by the Company’s representative about errors, did just as she was asked to do: she gave it. She indicated that errors were made because people were logging off the phones and otherwise shirking their responsibilities thereby creating problems in the operation. Her main point though was that the manager was not doing his job and was lousy at it by being lax and letting people get away with rules infractions – thereby causing the problems they all came to discuss. Many of the employees agreed with this but the manager present and some of the employees, presumably those who were culpable of doing this, took umbrage over that since he was the target of her comments.

The grievant, who was from another state, had prior problems in communication but was fired, ostensibly for insubordination, but in reality, for not being “Minnesota nice.”

She was reinstated because not only was there no direct order prohibiting the behavior – the employer actually asked for exactly what they got from the employee, who was apparently the only person in the room with the courage to speak up. See *CWA and Consolidated Telephone Co.* (Jacobs, April 21, 2008), decision on file with Minnesota BMS. As always, be careful what you ask for – you might get it.

**ARE THERE ANY MITIGATING FACTORS PRESENT?**

1. Did the refusal continue or was there eventual compliance? Arguing about how the order should be complied with is one thing, but simply saying “no” and not doing it is quite another. The former may be seen as an assertion of one’s perceived rights under the contract or a discussion about the best way to perform the job, while the latter is a direct affront to management’s authority and will be harshly dealt with by both employers and arbitrators.

2. Were there any impediments to compliance? Did the employee have difficulty in getting parts or materials? Other logistic problems?

3. How was the order communicated? Was it done respectfully or was it accompanied by ridicule or profanity as was the case in *University of Chicago v Carpenters and Joiners Local 215, FMCS case # 01-0554* (Jacobs 2002)?
4. When was the order communicated? This may be an issue for overtime work requests. Telling someone that day to work overtime when their schedule may not allow it is perhaps different than telling people a week in advance that they will be required to work overtime.

5. How has this conduct been treated in the past? Is insubordination treated by progressive discipline and if so how? What is the legitimate expectation with regard to this?

EXCEPTIONS - DEFENSES

HEALTH AND SAFETY DEFENSE

Elkouri notes that “an exception to the “obey now grieve later” doctrine exists where obedience would involve an unusual or abnormal safety or health hazard.” See Elkouri and Elkouri, How Arbitration Works, 6th Ed. at page 1023. See also, Elkouri and Elkouri at pages 262-67. Professor St. Antoine also notes that “Employees need not immediately comply with an order or rule if they reasonably believe that obedience would place the employee or others in imminent danger of harm: or would suffer an immediate and substantial harm and would lack any satisfactory remedy after the fact.” The Common Law of the Workplace, St. Antoine, BNA 2005 at Section 6.8, page 188.

The employee must have a “reasonable” concern for his or her own safety or the safety of others for this exception to apply. This obviously depends in the facts of each case. Elkouri in fact notes that the ‘search for a definitive evaluative standard has proven elusive.” Elkouri 6th Ed @ page 1024-1025. See generally, Elkouri and Elkouri, How Arbitration Works, 6th ed. pages 1022–1028. At best a review of the cases shows that the employee’s fears must be reasonable, whatever that means and that there must be a showing of actual potential harm or hazard or some “imminently dangerous situation” justifying the refusal to perform the work. See also, Laclede Gas Co, 39 LA 833, 839 (Bothwell 1962).

Elkouri notes that the health and safety exception has been held inapplicable where the hazard is inherent in the employee’s job. See, How Arbitration Works 6th Ed. at page 1023. Moreover, the employee must explain the reason for the refusal before announcing they are refusing the work.

Elkouri notes that arbitrators even disagree over who bears the burden of proof of this. Some hold that the employer bears the burden of proof that the employee’s concerns were not reasonable while others hold that the employee bears this burden. It would seem that since this is an affirmative defense the more reasoned view is to require the employee to bear the burden of showing that the refusal was reasonable and based on a rational concern for the safety of the employee or others.

In one case the employees refused to perform certain work claiming that an inmate had MRSA, a disease known to be resistant to many forms of medications. The inmate in question was known to be very combative and disruptive and the employees claimed that to deal with him placed them at risk of contracting the disease. They refused a direct order to work with the inmate claiming that he should be transported to a medical facility better equipped to handle his disease.

The County had provided specific training and equipment necessary to protect the workers and claimed that the refusal was not reasonable under these circumstances. The work was inherently dangerous and it was shown that jailers come into contact with many people who have various diseases some of which are highly contagious and dangerous. They are trained and equipped to deal with this. MRSA was no different. The grievances were denied. See, Dakota County and IBT 320, (2000 Jacobs).

CONTRACTUAL VIOLATION

Employees may claim that doing certain work will violate the contract. This is perhaps the classic case of “obey now and grieve later” unless it can be shown that there is some reason that performing the work or carrying out the order will not be remediable through the grievance process.
Note too that the employee takes some risk here and re-directs the focus of the subsequent arbitration from one of whether there was a contractual violation to whether there was a reasonable refusal to perform the work and whether there is just cause for the discipline that is certain to be meted out. It becomes a question of who is on the hot seat – the supervisor who directed the employee to perform work outside the contract or the employee who has been disciplined for refusing to comply with the directives of a supervisor.

Thus, even if it is later shown that the order did violate some section of the CBA the employee who refused it had better have a good reason for not complying with it initially, especially if there was no harm done and the employee was not in danger by doing it.

For examples of cases involving this issue see Fairmont General Hospital and Retail Wholesale and Department Store Union, Local 550, 119 LA 134 (Miller, 2003) and Fraser Papers, Inc. and PACE Local 7-0445, 118 LA 1000 (Wyman, 2003).

REFUSAL TO WORK OVERTIME

The employee might legitimately argue that working overtime in violation of the contract cannot be remedied since the time cannot be gotten back – one cannot unring the bell, so to speak.

This will of course depend on the facts and the employee faces a Hobson’s choice here. The contractual provision had better be crystal clear. Where there is a difference of opinion the “obey now, grieve later” rule will usually prevail. The union retains the right to bring a grievance for damages and for an award interpreting the contract in the face of the alleged violation. It again changes the focus from one of whether there is a contract violation to whether there was just cause for discipline.

EMPLOYEE’S REQUEST FOR TIME OFF

Related to the issue above is a request for time off that is refused and the employee goes anyway, claiming some need or contractual right to it. This is generally subject to the “obey now grieve later” rule but arbitrators may be lenient when the facts show that compliance with an order that is in violation of contractual rights may not be remediable after the fact. One example of this is the request for vacation time that was refused allegedly in violation of contractual seniority rights where the employee had made good faith plans to go and working would have caused economic loss.

There is of course a considerable risk to the employee for doing this – they could even be considered AWOL and face the allegation that they forfeited their job along with the charge of insubordination. Again, these cases will depend greatly on the facts. Employers will of course need to establish that the request was reasonable. Unions will want to show that the loss to the employee was considerable or that there were very legitimate reasons for not complying, i.e. missing a wedding or other important event.

EMPLOYEE ACTING IN THE CAPACITY OF UNION STEWARD

An employee acting in their capacity as a union steward or representative may well have more latitude in saying and asserting things to management than line employees. Acting as the union steward is thus different in terms of the relationship between employer and employee than where that employee is not acting as the union steward.

Where the employee is a union official exercising rights on behalf of the bargaining unit and in pursuit of collective bargaining, conduct that otherwise may be the subject of discipline, remains protected activity, and can only be removed from that protection, by "egregious" misconduct. Thus, in Labor-Management Contracts at Work (Harper 7 Bros., 1961) Morris Stone, editorial director of the American Arbitration Association stated:
“When a steward or union officer is disciplined for violating some rule of conduct, there may be a dispute as to whether there was just cause for the penalty. To that extent a steward's case may be no different from that of any other employee. However, when the union asserts that the disciplinary action was motivated by an attempt to frustrate collective bargaining, or that the steward's violation occurred during the course of negotiations and was, therefore, beyond the reach of the employer's power to discipline, a different sort of problem is presented.”

A more current textbook on labor-management relations, *Discipline and Discharge in Arbitration*, (Brand, Norman, ABA, BNA, 1998), makes the same point:

A union steward or official serves in two capacities: first, as a bargaining-unit employee receiving pay or wages; and second, as a designated representative for the union in what are commonly referred to as union activities. When the union representative is acting in an official capacity, negotiating grievances or engaging in collective negotiations, the union representative and the company have been described as “equals.” Thus, arbitrators have recognized, that while acting on behalf of the union, “[a] union representative must be able to do his job properly, without fear of retaliation of any kind for the performance of his proper role” and that “[m]ere zealousness can never justify punishment and a steward is certainly entitled to be wrong in issues that he presses on behalf of his constituents.” Id at 326.

See also Elkouri, 8th Ed. at Section 5.11.CV. Elkouri provides an excellent discussion of the general rule and of cases where the steward’s activity “crossed the line” and provided a basis for discipline up to termination, where the actions were so outrageous or disruptive as to lose protection.

This does not give carte blanche to union stewards to act as they please however. Arbitrators and the Board have long held that there is a line over which even a union steward acting in that capacity dare not go.

Obviously, there is a vast difference between getting into a heated discussion even to the point of screaming in a closed negotiation session versus doing that same thing out on the floor in earshot and within the sight of other employees or clients/customers even if the steward is acting to enforce what they believe to be the proper interpretation of the labor agreement. See, *Union Fork & Hoe*, 101 LRRM 1015, (1980) where the Board, citing to its earlier decisions in *Clara Barton Terrace Convalescent Center*, 92 LRRM 1621 (1976) and *Hawaiian Hauling Service, Ltd.*, 90 LRRM 1011 (1975), reiterated that the NLRA protects a union steward even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure.

Stewards should be careful to make sure they do not get out of control in a way that might demonstrate to outsiders who may not be aware of what is going on. Examples of this might include yelling at a supervisor on the sales floor or engaging in profanity that offends the office staff or customer who may overhear the conversation.

Obviously too, the person seeking this protection must make it clear that they are now stepping out of their role as employee and into the role of steward. How this is done will depend, but a statement to the effect that “I, as union steward, believe you are violating the contract and so we are not going to perform this work,” or something to that effect, may make it crystal clear that the employee is acting as the steward at that point. There may be other circumstances, such as appearing on behalf during a grievance meeting where no “magic words” are not necessary since it is apparent that the employee is appearing as a steward in that setting.
This of course will depend on the facts of each case, but the rule is clear that when acting in the capacity of a union official, employees are regarded as equals to their supervisor and may make statements which would be disallowed and subject to discipline if they were not.

**POTENTIAL WEINGARTEN VIOLATIONS**

This arises in the situation were the employer wants to meet with the employee to discuss possible discipline. The employee expresses a desire for a union steward which the employee has a right to under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), but the employer refuses. Generally, the employer should stop the meeting until the steward is there but what if they refuse and order the employee to meet with them? Can the employee refuse?

Maybe not. The answer is not entirely clear but even many unions tell their members not to leave the meeting or refuse to meet in the face of what is frankly an unfair labor practice.

It is part of the “obey now grieve later” scenario. The Employer though runs a grave risk that any statements made in that meeting cannot be used to support the case for discipline.

**DISRESPECTFUL BEHAVIOR BY THE EMPLOYEE.**

Does calling your supervisor an idiot constitute insubordination? In many cases yes. There are instances where simple disrespectful behavior, profane language and even gestures can be interpreted as insubordination. There is a legitimate expectation of respect by employees toward their supervisors and using profane language, questioning their competence especially in front of other employees or customers of the business, and certain other actions can be found insubordinate behavior by employers and ultimately arbitrators.

Here again, this will depend on the circumstances. Saying something on the floor of a retail store is very different from what goes on in a steel mill or other heavy industrial shop for example. The case will get worse for the employee if the profane language etc. is used in the context of refusing work.

On the other hand, a supervisor who starts the conversation with obscenities and disrespectful behavior may not come to expect anything different from the employee. See *University of Chicago v Carpenters and Joiners Local 215*, FMCS case # 01-0554 (Jacobs 2002) (the supervisor confronted the grievant with very disrespectful words and actions before learning why the grievant did not immediately respond to his pages).

See also *Fabcon and Bricklayers and Allied Craftworkers Local #1*, FMCS case # 05-03238 (Jacobs 2005). The supervisor raised his voice and screamed obscenities into a cell phone quite loudly and the grievant hung up on him. The discipline for insubordination in that case was overturned on several grounds but there was a clear factor that the supervisor lost his temper well before the grievant did and was acting inappropriately.

The circumstances will vary with what is accepted in the shop and how events unfolded. In a case where the employee had been told repeatedly not to yell at his supervisor and not to impugn his ability to supervise, an employee was fired for telling the supervisor that he was a “liar and would burn in Hell” in a closed meeting to review the grievant’s work performance. See, *IBT #120 and University of St. Thomas*, FMCS case # 060504-55873-7 (Jacobs 2007). That case turned not only on the behavior, but also on the repeated admonishments not to do it again and the repeated violations.
PERSONAL RIGHTS

Some of the most significant exceptions to the “obey now, grieve later” rule involve basic personal rights. These vary with the nature of the claims of personal rights and whether they involve some religious or other type of statutorily protected activity that provides a basis for a refusal. These cases frankly are never easy and many times involve a discussion of issues outside of the bargaining relationship.

Here are a few fact patterns and their outcome. These are illustrative examples only but provide some basis for the discussion about what happens and what the analysis is when there is a clash between the legitimate rights of an employer to direct the work of employees as opposed to certain individual rights that are likely not specifically referenced in a labor agreement:

1. Refusal to allow access to computer files where 5th Amendment rights were impacted - no insubordination since there was no obligation to answer the questions. This case is very fact specific. Washoe County and Washoe County Employees’ Assn., 97 LA 393 (Concepcion, 1991). The arbitrator noted “Put simply, where an employee cannot be compelled to answer a question, he or she cannot be considered insubordinate when he or she refuses to do so.”

2. Refusal to work on Good Friday because of religious preference versus religious obligation – insubordination was found largely on the basis that there was lack of proof of the true need to attend services. Bronx-Lebanon Hospital Center and Retail, Wholesale and Department Store Employees, 90 LA 1216 (Babiskin, 1988).

3. Refusal to sign broad request for medical information based on right to privacy - no insubordination. Dakota Gasification Company and International Brotherhood of Electrical Workers, Local 1593, 120 LA 762 (Kenis, 2004). See also, Roth Pump Mfg. Co. and National Industrial Workers Union, Local 607, 82 LA 1199 (O'Reilly, 1984). HIPAA, the Health Inventory Privacy and Portability Act, may now cover a lot of this. Employers sending people for a drug test, for example, should be careful to make sure the health care facility knows who is requesting the test so they can be assured access to the records. If you don't pay for it, you may not be able to get the records without an authorization from the employee and if the employee does not wish to sign it, there may be a valid reason for that refusal.

4. Refusal to submit to drug test as a matter of contract right where there was no reasonable suspicion for test - no violation found. Pioneer Flour Mills and Teamsters, Local 1110, 101 LA 816 (Bankston, 1993). This too is a fact specific case but provides a good discussion of the analysis used to determine whether insubordination occurred or not.

5. Refusal to submit to drug test due to absenteeism - no violation of “obey now, grieve later” and no insubordination found. The arbitrator noted that under these facts there was a legitimate expectation of privacy and that this controlled. Utah Power and Light Co. and IBEW, Local 57, 94 LA 233 (Winograd, 1990).

6. Repeated refusal to submit to psychiatric fitness for duty examination - discharge upheld. LaGloria Oil and Gas Co. and PACE, 119 LA 1675 (Allen, 2004). This case is somewhat fact-specific, but provides some discussion on the rules that may apply here.

“GROSS” INSUBORDINATION

Insubordination covers a wide range of behavior. Some agreements recognize this and refer to discharge for “gross” insubordination, or in some similar fashion acknowledge that some insubordinate behavior is less serious than others.
Generally, the distinction between insubordination and “gross” insubordination, if such a distinction can be drawn, rests on how blatant or public the employee’s insubordinate behavior. For example, assume a supervisor approaches an employee who is working alone and gives the employee an order. The employee expresses disdain either by taking too long to comply or by word or deed. While the facts establish insubordination, the employee’s behavior took place in isolation from the workforce and did not cause any serious disruption of the workplace. Discharge might not be sustained on these facts because the nature of the insubordinate conduct is neither inherently disruptive nor beyond the ability to correct through discipline.

Conversely, if the order is given to an employee in the presence of others, and the employee challenges the order by an outright refusal, or by abusive language or other behavior that denigrates the authority of the supervisor, a far more serious case exists. On these facts a discharge is far more likely be upheld given that the conduct was not only inherently wrong, but also was a public challenge to the authority of the supervisor. In this case the harm caused by the insubordinate behavior extends to the workplace as a whole and discharge becomes a reasonable disciplinary response.

In one case the employer brought in outside trainers to develop a new production system and told the employees this would be happening. The arbitrator found that the Company had adequately notified the employees that these individuals had authority to direct the workforce and that the grievant was repeatedly told by his direct supervisor to follow the direction of the trainers.

The operative CBA language read as follows:

“...No warning notice need be given to an employee before being discharged if the cause for such discharge is one of the following: …

D. Refusal to follow an order of supervision in the presence of a steward or Union representative.”

The grievant was told to follow the directives of the trainers and he refused. The supervisor then brought over a steward to hear the order. The order was again given whereupon the grievant’s answer this time was, “F**k you, no.” His subsequent discharge was sustained. See, Red Wing Shoe Co. and UFCW #527, FMCS CASE # 05-51578 (Jacobs 2005).

This was about as clear cut a case of “gross insubordination” as one could imagine. What was significant though was the language of the CBA that virtually required termination if the proper facts were found.

There may be simply a good faith difference of opinion over how to do the work rather than refusal to do the work or follow the order. In University of Chicago v Carpenters and Joiners Local 215, FMCS case # 01-0554 (Jacobs 2002) the grievant was directed to build a crate to ship a large freezer. The employee was a long-time employee who clearly knew how to build crates and had done so many times before. He determined that the crate should be a certain size and configuration and started to build the crate. The order had been only to “build a crate.” When the supervisor saw it, a heated argument ensued over how to best construct it. There the charge was overturned.

In another case, the employee was directed to saw off part of a wall on a building under construction. The request was made by phone from a supervisor that was not on the job site and was not aware of the conditions or the difficulties faced by the work crew. The employee was a long-time employee with many years of experience. A disagreement ensued over the phone that culminated with the employee hanging up on the supervisor. The insubordination charge was sustained for the hang up but the main charge, i.e. gross insubordination for failure to perform the work as directed, was overturned and the employee reinstated.
There was no “refusal” to do the work, only a disagreement as to how best to do it. Under those circumstances the grievant was successful in showing that indeed this was the best, and safest, way to do the job.

**DISCIPLINE FOR POOR PERFORMANCE**

Job performance is at the heart of the employment relationship. It implies that there is a fair day’s pay for a fair day’s work – but what is a fair day’s work and what is legitimately to be expected of the employees?

Keep in mind the fundamental difference between misconduct and poor performance. Misconduct = doing something wrong vs poor performance = doing something right just enough of it or well enough.

At this point, the discussion is about discipline or even discharge for an employee’s inability to perform the job. The question of job performance as it relates to promotion and seniority – i.e. dispute is over a junior EE getting job over a senior EE and CBA language compares job performance and ability, is another topic and gets into the notion of seniority and how relative ability may be measured.

There may be issues of how production standards are measured, i.e. time efficiency studies or comparable worth to compare the relative value of jobs. Those are slightly different topics. Here we are talking about what to do with the well-intentioned but underperforming employee.

**ALTERNATIVES TO DISCIPLINE**

Has the employer done anything to try to help the underperforming employee? Can the employee be reassigned? This may interact with seniority clauses though but there should be a discussion of whether the employee could be re-assigned to a more appropriate job.

Are there any accommodations that can be done – This of course may well run into ADA issues, but this topic is not about ADA accommodations although that may well be a defense that is raised. These are typically very fact specific cases and sometimes require testimony about the ADA or other statutory requirements to accommodate a disability.

However, there may well be a discussion about how the work or the work environment can be changed or adapted.

Can the employee get work done with some assistance? What would that entail and cost? Are there other contractual issues that may need to be addressed?

Is discipline necessary at all? – Perhaps not. Is the employee ready to retire? Is that an alternate?

What efforts have been made to help the employee? Has progressive discipline been used? To what effect

**DISCIPLINARY ANALYSIS**

Notice – have the requirements been clearly communicated? Have they always been enforced consistently?

How reasonable are the standards? Is everybody else meeting them or is this employee the one who simply cannot get the work done or is failing to meet quality standards. This may require considerable review of the production standards and of other employee records.

What investigation has been done? Over what period of time?

Is the employee simply having a rough patch due to health or other concerns? How has the employee’s performance been in the past?
“Guilt” of poor performance?  As noted, how far off is this employee?  Have others also failed to meet performance standards?  Has here been a comparison of any age, mental or physical factors – we live in an age of older workers who are not as fast as their younger counterparts.  Over what period of time?  What efforts have been made for other employees if they were not able to meet production standards?  Has there been adequate training and equipment given to this employee?

Disparate treatment and penalty issues?  As in all discipline cases, how have others been treated?  Did they get different training or equipment or other assistance?

PERFORMANCE STANDARDS

- Management gets to set the standards and how to measure them.  The question may well be how reasonable they are.  Is this a sweat shop where people are expected to act like robots?
- Management should be able to show how the quantity and quality of the product or service is measured and how the employee is not meeting those standards.
- How objective are the standards?  Are they measured in a mathematical way or are they subjective – i.e. things like quality of service or courtesy to customers?  Are there “industry” standards that apply?  If so, have those been communicated to the employees a standard they must meet at this employee?
- Have the standards changed over time?  If so, why?  Is that due to technology or other factors?

In one case a worker with 22 years of experience was disciplined for rating a gas leaks a Grade B – not as serious – versus a Grade A – serious leak - and prioritized them to repair work.

The facts showed that there was a subjective amount of discretion given to the repair personnel to determine what grade any such leak was and to prioritize them for either immediate emergency repair or for repair that could be done later.  Based on the subjective nature of the work the employee was reinstated.  See, Gas workers and Centerpointe Energy, FMCS CASE # 110911-58671-3 (Jacobs 2012).

In another case the production standards changed and the employee was not meeting the number of gas meter “reads” as was required.  The standards however changed from a daily amount to a monthly amount.  The grievant failed to meet standards on 17 of 55 months.  Other readers were able to meet standards most of the time but there was evidence that their routes were different and did not require the same amount of driving time the grievant's did.  On the unique facts of the case, the employee was also reinstated with a suspension and an admonition that he must improve performance or face additional discipline.  See, Moorhead Public Service Utility and IBEW, BMS Case # 09-PA-0709 (Jacobs 2009).

SOME FACTORS TO CONSIDER

- Has the employee complained about poor equipment or training before being disciplined?  What was done in response to that?
- Was there help in terms of EAP or a leave of absence?  Is the lack of performance due to medical issues?  These may well be factors an arbitrator will consider.  The greater the showing of assistance to the employee, the greater the chances the discipline will be upheld.
- Is the employee simply just not able to do the work no matter how hard he tries?  In UFCW #222 and Gelita, FMCS #190523-07453, (Jacobs 2019) the employee made several serious mistakes that ruined or tainted the company’s product.  There was also a matrix in the CBA that called for certain disciplinary consequences if the loss was of a certain dollar amount.
The employee actually went over those on more than one occasion yet was not immediately fired. He was given several additional chances and retraining to improve performance yet still made mistakes that cost the company a relatively large amount of money. The employee was well-liked but very short term. In that case the discharge was upheld.

Further, in *IBT #120 and Ziegler, FMCS # 190115-03294* (Jacobs 2019) the employee was given training and mentoring multiple times but simply was unable or unwilling to observe proper safety rules that led to a near tragic accident while operating a forklift. That discharge was also upheld.

**COMPUTER AND INTERNET MISUSE – YOU MEAN ONCE IT’S POSTED IT’S REALLY THERE FOREVER AND I COULD GET FIRED FOR IT?**

**JUST CAUSE AND COMPUTER MISUSE CASES**

As in all cases of employee discipline just cause is generally required, and the same sorts of elements or requirements are present. Computer misuse and Internet cases present their own special set of criteria in terms of proof and appropriate penalties for infractions.

Some cases had to do with the relative “newness” of the technology and how it all worked. In one of the earliest reported cases a school employee was reprimanded for e-mailing colleagues about the school’s policies. The reprimand was based on the use of a school computer rather than on the content of the messages. The arbitrator overturned the discipline and sustained the grievance based largely on the lack of a clear policy regarding use of school computers. See, *Conneaut School Dist. and Conneaut EA*, 104 LA 909 (Talarico 1995). See also, *Allied Signal Engineers*, 106 LA 614 (Rivera 1996). Inadequate definition of the term “offensive” in the company policy.

More recently, and after employers began modifying their policies clarifying, what was prohibited, some arbitrators began sustaining discipline for violations. In *AFSCME # 727D and Menomonie WI Schools*, #64, 68669 MA 14305 (Morrison 2009) the arbitrator sustained a discharge where the employee sent offensive, obscene and pornographic materials through e-mail. See also, *Wausaukee EA and Wausaukee WI Schools*, #63801 MA 12717 (Mawhinney 2005).

In *Washington Metro Transit and Fraternal Order of Police*, 124 LA 972 (Evans 2007) an employee inadvertently sent an offensive e-mail. He tried to rescind it and even sought out those to whom he had sent it to apologize. The arbitrator overturned the discharge but imposed some lesser discipline due to the inappropriate nature of the e-mail.

Most employers now have such polices and the early cases that turned on the inadequacy of the policy, i.e. notice, would be analyzed somewhat differently now. It is generally recognized that obscene, pornographic (whatever that is), racist materials sent by e-mail are prohibited and that violations of this policy will be severely punished.

The elements of just cause are still required though. Like any case involving just because there are generally accepted elements needed to prove the case:

**Is there a clear policy?** (See below with regard to social media.) Note that there may be a difference between a policy regarding the use of work e-mail and work computers versus what can be posted on social media. The former focuses on the use of employer provided equipment and doing work during work time whereas the latter tends to focus on the message itself and whether it is prohibited or protected by some other statutory scheme.
Is the rule reasonable?  For example, is there a nexus between Internet use in its various forms and the work?  The standard kinds of questions regarding nexus apply, i.e. Is there a policy regarding the off-duty conduct?  Is the policy reasonable – very fact specific?  Does the conduct harm the employer’s business?  Does the conduct harm the employer’s reputation – what evidence is there of that?  Does the off-duty conduct affect the employee’s ability to perform the job?  Does the conduct adversely affect whether other employees or customers will work with the employee?

Investigations – both parties should be prepared to explore just how the information was obtained regarding misuse and be prepared to prove (or disprove as the case may be) that the employee was in fact the person responsible for the use or the message.  This may require some IT personnel or even experts in appropriate cases.

Disparate treatment and appropriate penalty.  These considerations are always relevant in any disciplinary case.  How has this been treated in the past?  Are supervisors also sending out similar messages?  Have there been other cases where the discipline was similar?

EXPECTATIONS OF PRIVACY - ON DUTY AND EMPLOYER PROVIDED EQUIPMENT

Elkouri, even in the latest edition, notes that “there have been relatively few reported decisions involving computer monitoring or monitoring of employee’s e-mails.”  Elkouri cited PPG Industries, 113 LA 833 (Dichter) where the arbitrator upheld the employer’s authority to access employee.  Elkouri and Elkouri, How Arbitration Works, 8th Ed BNA Books 2016.

After City of Ontario v Quon, 130 S.Ct. 2619, (2010) the question of whether the employer can access the device and look at what the employee has been doing is relatively well settled.  In most cases the employee has no legitimate expectation of privacy and should expect that the employer can access the device.

The City issued pagers that had text messaging capability and allowed officers to use it for some personal use.  The City had a clear policy that reserved to the City the right to “inspect and monitor” all network activity, including e-mail and internet use.  It further stated that users should have no expectation of privacy or confidentiality of their use.  The employee signed that and acknowledged he understood it.  The policy did not strictly apply to text messages per se.

The contract with the provider had a limit on the number of texts per month.  Several officers including Quon, exceeded their monthly limit and the City sought to audit the usage on the pager.  Quon offered to reimburse the City for the overages over the course of several months.

Nonetheless, the Chief audited the messages to see if the number of allowed messages was too low.  He wanted to see if the overages were due to work related texts or personal ones.  In doing so he found a large number of personal, sometimes sexually suggestive, messages that coincided with Quon’s work schedule.  He was disciplined and challenged the search of the pager as violative of the 4th Amendment and under the Stored Communications Act, discussed more below.

The Court ultimately rejected his claims holding that the search was for legitimate purposes – either to make sure employees were not being charged for work related texts or that the city was not being charged for personal ones.  There was an assumption – without a specific holding – that Quon had no reasonable expectation of privacy in using a city issued pager.

It is still a good idea for employers to have a policy in place or some clear advisory that tells the employee that.  At this point in history though, it is almost one of those “everybody should know this” propositions.  It is akin to the notion that everyone should know by now that simply hitting “delete” does not make the information go away.
Here the question is really about what the information is and how damaging it is or how violative of the employer’s policy it is. Here it is important to have a policy that states clearly what employees may or may not do with their devices and how strictly enforced it is.

Accessing pornography is a fairly easy case. See, Xcel Energy, 119 LA 26 (Daly). Accessing eBay for a few minutes a day, checking the weather or personal emails may be more difficult in light of a policy that allows some personal use of the Internet. In one case though an employee was discharged, and the discharge upheld, where he had been observed accessing the Internet repeatedly throughout the day. This did not involve pornography but instead were sites that were non-work related. See, Dep’t of Veterans Affairs, 122 LA 106 (Hoffman 2006). See generally, Elkouri, 8th Ed, at Section 8.7.I. ii. Those cases will very much depend on the facts.

OFF CONDUCT WITH EMPLOYER PROVIDED EQUIPMENT

Again, it is relatively well settled that an employer may access the device and its memory to determine what the employee is doing with their computers or other electronic devices. Clear policy should be given to the employees, so they know what they can and cannot do with the computer. There should also be clear notice about protection of passwords or other sensitive information on the computer. Employees who leave their work computers etc. unattended or “on” without securing them or the passwords may be disciplined if the policy is explicit on that point. Most employers have such policies now making it clear what the responsibility is to protect against unauthorized access to it.

Issues that may arise here have to do with security of the device, use of the device to access prohibited sites and clarity of the notice to employees about proper use of the device. There will also be issues of enforcement – was it lax or inconsistent?

In one celebrated case in Minnesota, a college coach was fired for use of an employer issued cell phone when he took pictures of his young children playing in the bathtub. The college found the pictures and reported the incident to local law enforcement. Charges were filed but eventually dismissed by the State District Court. Despite the dismissal, the college fired the coach even though the pictures, which did contain some partial nudity – did not rise to the level of pornographic or obscene; at least not according to the Court.

The arbitrator sustained the grievance in its entirety, reinstating the coach with full back pay, ruling that the images did not violate school policy. He further called the prosecutor’s actions in attempting to charge the coach criminally “overzealous” and the college’s action, especially considering the total dismissal of all criminal charges, as entirely without merit.

This case, while instructive on one level focused on the content, which will be very fact specific. It also demonstrates the obvious difference in evidentiary standards between criminal and contractual matters. Just because a case is dismissed, or a person is acquitted does not necessarily mean that there was not a violation of the employer’s policy.

ON DUTY CONDUCT WITH EMPLOYEE PROVIDED EQUIPMENT

Issues here may focus on whether the employee is spending too much time on non-work-related endeavors – which is no different than just loafing or “theft” of time. If an employee is on their own cell phone perusing the Internet, they may well be subject to discipline for simply not doing their job. The employer likely has no inherent right to look at what the employee is looking at on their phone, but they certainly can expect that they will not be doing it on work time.
Evidence here will usually not come from an audit of the employee’s device but rather from extrinsic sources. For example, the employee posts numerous messages on Facebook during the day or spends excessive time on the internet, albeit with their own device, and that is reported to the employer. There could also be some investigative work to determine if the employee was sending messages or on the Internet during work hours – since those things can usually be determined.

Some employers are “friends” on Facebook for example and can see what and when somebody is posting. Comparing that to the work schedule can be a problem for the employee if there is an adequate investigation to verify the times.

It will also depend on the policy and how strictly it is enforced. Is there a policy allowing some personal use or is there a policy prohibiting any non-work-related use of the internet on work time? How well is that enforced? Are there other cases on similar facts giving rise to disparate treatment claims?

**OFF-DUTY CONDUCT WITH EMPLOYEE PROVIDED EQUIPMENT**

Here the question is not so much whether the employer will have access to the device but with what the employee says about the employer and whether there is a nexus to the work. This is about social media. What follows is a somewhat lengthy discussion about how social media has impacted employee discipline.

**SOCIAL MEDIA AND THE EMPLOYER’S POLICY**

IS THERE ONE AT ALL? There is no formal requirement that there be a formal policy prohibiting social media communications, but it is certainly advisable to have a clear policy with regard to what is permissible and perhaps even an explanation of why certain types of statements or pictures on social media are prohibited. It is also advisable to post the consequences just as any employer policy should in order to pass muster on a just cause analysis.

Without a clear policy, the discharged employee and union can legitimately argue that there was no policy or rule against what they did. There could however be cases of obvious sorts of actions, such as a recent YouTube video showing a fast food chain’s employee, identified as such on the video, tainting food and showing extremely unsanitary conditions in one of the company’s facilities.

This might well fall into the “any damned fool rule” though and the question of whether it was on social media or not is likely irrelevant. Would it make any difference for example if the workers were witnessed by a customer or health inspector sabotaging the food versus the employees being stupid enough to video themselves doing it and posting it on YouTube? Likely not.

Here though the issue is the message not the medium. It is what the employees did that is the main focus, discussed more below, and not how the message was disseminated, that is the crucial inquiry in determining if just cause for discipline exists or not.

There are two separate but interrelated issues that have come before the National Labor Relations Board, NLRB or Board in dealing with social media policies. The first deals with the policy itself and whether it is overbroad and might chill or interfere with employee’s legitimate exercise of Section 7 rights.
The second issue deals with disciplinary actions taken by employers in response to a posting on social media and whether the postings themselves are protected activity under Section 7, i.e. whether the posting is “concerted” or whether it is so indefensible as to lose Section 7 protections.5

**NLRB – GENERAL COUNSEL MEMOS**

There have been three fairly recent NLRB General Counsel Memos dealing with social media policies: Memo OM 11-74, August 18, 2011; Memo OM 12-31, January 24, 2012 and Memo 12-59 (May 30, 2012).

The General Counsel has looked at a number of policies and found in some cases they are overbroad and might reasonably lead employees to believe that otherwise protected conduct or statements might not be protected. The main question is whether a reasonable person be deterred from engaging in Section 7 protected activity under the terms of the policy?

The Board has dealt with a number of policies that prohibit things like “disparaging the company or its products or services, disrespectful statements aimed at employees of the company or its customers, inappropriate comments (without any further definition of what that looks like), disclosure of confidential or sensitive information or contacting customers without the employee’s permission.6

As the Board has said before, a rule violates Section 8 (a) (1) if it would reasonably tend to chill employees in the exercise of their Section 7 rights. See, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf’d. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. See also, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

5 As discussed further below, the Board also appears to examine whether the nature of the message is so vitriolic, disparaging or threatening as to lose its protected status. This will certainly be a very fact specific analysis and greatly dependent on the message and the context of it whether it is posted on Facebook, shouted at a supervisor or other employees in the break room or pinned to a bulletin board somewhere.

6 As discussed below, the disclosure of certain kinds of proprietary or confidential information may well be disciplinable no matter what. Under HIPAA for example, a health care worker or RN is strictly prohibited from accessing a patient record without express written consent of the patient or patients’ legal guardian or unless the healthcare worker is specifically assigned to give healthcare to that patient. Beyond that divulging information about that patient to unauthorized persons may well be a violation of the statute and be subject to discharge. One could also imagine posting information about suspects or a case under investigation by a law enforcement employee might well be a very serious breach of confidentiality and be dischargeable as well. There was a case involving a California highway patrol officer who posted gruesome pictures of an accident victim on the Internet without anyone’s consent. There was no policy in place and no statute prohibiting that so there were no adverse employment consequences. There are both policies and statutes in place now that would lead to a very different result, but the point is that these kinds of actions might well fall under different prohibitions and that arbitrators would be hard pressed to reinstate someone who violates those other prohibitions unless there is a very clear purpose for them under Section 7. See *Knauz Motors* infra, 358 NLRB No 164 (Sept. 28. 2012) where one set of communications on social media was ruled to be protected whereas another was not based on the nature of the communication and whether it was truly concerted activity.
EXAMPLES OF POLICIES THE BOARD HAS DECLARED VIOLATIVE OF THE ACT

In one case the GC dealt with a policy that read as follows:

“Use technology appropriately

If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles.

Don’t release confidential guest, team member or company information.”

The GC found this section of the handbook to be unlawful because its instruction that employees not “release confidential guest, team member or company information would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7. The Board has long held that employees are allowed to discuss these matters and that policies that prevent or chill that violate the Act.

The GC also dealt with another such policy that read as follows:

“Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:

Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.

Develop a healthy suspicion. Don’t let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.

Watch what you say. Don’t have conversations regarding confidential information in the Break room or in any other open area. Never discuss confidential information at home or in public areas.

Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information.

We’re serious about the appropriate use, storage and communication of confidential information. A violation of [the Employer’s] policies regarding confidential information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.”

The GC found certain parts of this to be unlawful because the provisions “not to have discussions regarding confidential information in the break room, at home, or in public areas” were overbroad.

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7 See, NLRB, General Counsel Memo 12-59 (May 30, 2012)
The GC found unlawful the provisions of the above policy that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information.

The GC did not find unlawful that portion of the handbook section that admonishes employees to develop a healthy suspicion, or the provisions that caution against being tricked into disclosing confidential information, and urges employees to be suspicious if asked to ignore identification procedures. The GC found that those provisions merely advised employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications.

In a case that spoke directly to the issue of social media the GC found that certain portions of the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

That policy provided as follows:

“USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE

If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer's media] site. If you are still in doubt, don’t post. Non-public information includes:

Any topic related to the financial performance of the company;
Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;
Secret, Confidential or Attorney-Client Privileged information;
Information that has not already been disclosed by authorized persons in a public forum; and

Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.

Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.

Get permission before posting photos, video, quotes or personal information of anyone other than you online.

Do not incorporate [Employer] logos, trademarks or other assets in your posts.”
The GC found that the term “completely accurate and not misleading” to be overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of the employer’s labor policies or its treatment of employees. The GC also noted that there was a lack of specific examples to give guidance to employees. (Arbitrators may want to look for those in cases involving employee discipline and the defense that the policy was overbroad or undefined and did not specifically prohibit the activity being complained of.

The GC had other problems with this particular policy. The section of the policy that cautioned employees that “when in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea.” The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See, Brunswick Corp., 282 NLRB 794, 794-795 (1987).

The GC was OK with the prohibitions on discussing information related to the “safety performance of [Employer] systems or components for vehicles” and “Secret, Confidential or Attorney-Client Privileged information.” Neither of these provisions referred to employees and employees would reasonably read the safety provisions as related to the safety of the products, not the safety of the workplace itself.

The inquiry seems thus not to be so much whether the policy prohibits the disclosure of material that could be confidential etc., but rather whether the policy could be reasonably construed to chill Section 7 rights of employees. It is a fine line to be sure but it is clear that the GC and Board flyspecks these provisions with an eye toward whether they can reasonably be read to chill Section 7 rights or could be reasonably interpreted that way. The implication is that an arbitrator faced with disciplinary cases against employees who have allegedly violated these rules should, or may at least be asked, to engage in a similar analysis.

Note too that a general provision that simply says that the policy against use of communications in social media does not prohibit employees from engaging in protected activity under the NLRA was not sufficient to save the rule. That was found to be too nebulous to mean anything where there were more general statements prohibiting certain types of communications.

The GC found that the following policy was acceptable, not overbroad and did not constitute a violation of Section 7. The policy was somewhat lengthy and will not be reproduced in its entirety here, but was appended to the GC’s Memo #12-59, May 30, 2012, supra, and will likely be used extensively by employers anxious to avoid a ULP charge. The salient features of that rule were as follows:

“Know and follow the rules
Be respectful
Be honest and accurate
Post only appropriate and respectful content
Using social media at work
Retaliation is prohibited

8 For example, the GC Memo 12-59 of May 30, 2012 found lawful a somewhat general provision under which harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers. This was apparently specific enough and did not involve either concerted activity or the discussion of workplace conditions protected under Section 7 to pass muster under Board scrutiny.
Media contacts”

Within each of these categories there were detailed guidelines and some examples of prohibited behavior that the GC found entirely lawful. The full text of the policy is appended to the GC’s memo of May 30, 2012 and will no doubt provide considerable guidance to employers seeking to promulgate an acceptable social media policy. The essential feature of the policy though was that it provided concrete guidance and did not speak in broad generalizations. Obviously whether or not any particular communication will be found to be protected or not will depend on the nature of the communication and even the context in which it arises.

The Board has considered some specific cases that provide guidance to arbitrators in determining the appropriate level of discipline under a just cause analysis. Some examples of this are provided below.

A CHANGING LANDSCAPE – WELL, POSSIBLY

In 2017 the NLRB overruled older pronouncements regarding social media policies. In *Boeing Co.* 365 NLRB 154 (2017) the Board overruled *Lutheran Heritage – Livonia* 343 NLRB 646 (2004). In *Lutheran Heritage*, the Board upheld that such social media policies ran afoul of the NLRA, specifically Section 7, if the rules could be “reasonably construed” by EE’s to prohibit exercise of Section 7 rights.

In *Boeing* the Board established a new test to determine if policies violated the NLRA. The Board will now evaluate the nature and extent of the potential impact on the NLRA and he legitimate justifications for the rule.

The Board established three categories: 1) Rules that the Board designates as lawful either because it does not interfere with NLRA rights or because the potential impact on protected rights is outweighed by the need for the rule. (The no camera rule in that case fell into this category due to the need to protect proprietary information in the plant.)

2). Rules that warrant individualized scrutiny. Obviously, this will be a very fact specific analysis that will entail evidence of the impact on potential Section 7 rights and what the legitimate business reasons are for the rule itself.

3). Rules that are unlawful because they impair protected conduct and the impact is not outweighed by the justification for the rule. For example, a rule that prohibits employees from discussing wages or benefits with co-workers.

At first glance that may seem a very different analysis but in September 2019 the Board again found that a rule that seemed innocuous was unlawful. In *Friendship Village, d/b/a Brighton Rehabilitation*, 06-CA-209251, (July 3, 2018) and discussed in a Board advice memorandum issued September 2019) the employer had a policy that read simply: “Make sure you are always honest and accurate when posting information or news, and, if you make a mistake correct it quickly. Be open about any previous posts you have altered. Remember the Internet archives almost everything; therefore, even deleted postings can be searched.”

The second part of the rule read “Maintain confidentiality of friendship Village private or confidential information. Do not post internal reports, policies, procedures or other internal business-related confidential communications

The first rule was found unlawful because the Board ruled that employees have a right to make inaccurate statements as long as they are not “malicious defamation.”

The second rule was also found unlawful because such a rule could reasonably be interpreted by EE’s to include information about their own wages and terms of employment.
Frankly, if this sounds a lot like the Lutheran heritage analysis, I think that would be right. Bottom line – it is unclear at this point how such rules will be analyzed under Board rules and what impact that may even have on Montana cases but I include it here in case somehow it might.

SECTION 7 RIGHTS – SOME CASE EXAMPLES

DOES THE EMPLOYER’S DISCIPLINE USING ITS SOCIAL MEDIA POLICY VIOLATE SECTION 7 RIGHTS?

Laurus Technical Institute, #10-CA-093934 (Filed June 13, 2014)

The NLRB struck down a “no-gossip” rule as being overbroad and that firing an employee for violating the rule was unlawful. The employer promulgated a rule against talking about another person’s personal life when they are not present, their professional life with or without a supervisor present and shaming or spreading rumors about another person.

Laurus arose when an admission representative at the school discussed the discharge of three other employees verbally. The import of this decision though could easily be applied to social media – obviously if that same person did that on Facebook the case would not have been substantively different.

This case, and those discussed below, show the complexity and difficulty employers and employees alike face when dealing with this new technology and the application of well-establish rules in the workplace.

The Board has decided several important cases in recent years regarding the use of social media that involved employee discipline and whether the policy as applied violated the Act. The critical issue here is whether the posting is protected under Section 7. The Board’s general rule in this determination is whether the employees’ action is concerted within the meaning of Section 7, is for mutual aid and protection and whether the posting was so indefensible as to lose its protected status.

Pier Sixty, 362 NLRB No 52 (2015). The Board held that a fairly offensive post calling the supervisor all sorts of disparaging and profane names was protected. The employees were banquet workers who were in the midst of a union election campaign. A few days before the election their supervisor, named Bob, yelled at several of the workers, including the employee who posted a message to Facebook. This was apparently loud enough to be heard by customers of the banquet.

Bob said, in a raised, harsh tone, “Turn your head that way and stop chitchatting.” Later he yelled at the employees, “Spread out, move, move.”

In response to that the employee posted the following message to his Facebook page:

“Bob is such a NASTY MOTHER F***KER don’t know how to talk to people!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!”

The message was visible to the employee’s friends on Facebook including many who worked for the employer. Not surprisingly, that message got back to the employer who fired the employee.

The Board ruled that the message was part of a concerted activity by the employee and that the post was not so offensive or opprobrious as to lose its protection. This kind of language was used frequently by others and this was not heard by the employees. (Compare this to the Vista Nueva ruling above where the arbitrator held that this type of language would not have been used around other employees. Here even though the employees frequently used this sort of language, they would likely have used it around the customers at a banquet.)

The Board cited Atlantic Steel, 245 NLRB 814, 816-817 (1979) with approval but held in this particular case that the message was protected and not so offensive as to lose protection under the Act.
This case provides an excellent example of the fine line drawing the Board sometimes engages in. The case involved an upscale BMW car dealership and the efforts to hold a sales event. When the general manager called the sales personnel together to announce the event, he told them that there would be hot dogs, cookies and potato chips as part of the effort to attract customers.

The sales team lamented that this was a little low brow and that this was not the appropriate food for such high-end automobiles. One sales representative posted a somewhat acerbic message on Facebook regarding the food choice. He sarcastically remarked that he was happy to see that the employer had gone “all out” for the important car launch by providing small bags of chips, inexpensive cookies, semi-fresh fruit, and a hot dog cart where clients could get overcooked hot dogs and stale buns. The photographs included a co-worker holding a water bottle, kneeling next to a cooler; several of the cookies and snack table; one near the hot dog cart, and one of the promotional banners.

At the same time that same representative posted a picture and another equally sarcastic message about an incident involving the employer’s other dealership, a Land Rover dealership. One of the sales representatives at that dealership had apparently allowed a prospective customer’s 13-year old son to sit in the driver’s seat. The boy somehow got the vehicle to move, lost control of it and it rolled over his father’s foot and down a hill into a pond. As one can imagine, this caused considerable damage to the vehicle, liability to the dealership as well as embarrassment to all concerned. The employer got wind of these postings on Facebook and promptly fired the employee.9

The Board found that the post about the sales event was protected as concerted activity under Section 7 but that the Land Rover post was not. The ALJ in the cases found and the Board affirmed that the sales event posting was for mutual aid and protection because the success of the event was directly tied to the commissions and compensation the sales representatives could earn as the result of it. The Board also determined that he was vocalizing the sentiments of co-workers and continuing the course of concerted activity that began when the salespeople raised their concerns at a staff meeting where the details of the sales event were made known to the sales staff.

The Board also found that the postings were “not so opprobrious as to lose their protections.” Citing Atlantic Steel, NLRB 814, 816-817 (1979), which typically applied to employees disciplined for public outbursts against supervisors.

Further, the Board found that the inquiry is whether the communication is related to an ongoing labor dispute and whether it is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection and stated as follows: “Here, the employee's postings were neither disparaging of the product nor disloyal. The postings merely expressed frustration with the employer's choice of food at the sales event. They did not refer to the quality of the cars or the performance of the dealership and did not criticize management. We found it irrelevant that the postings did not clearly indicate that they were related to a labor dispute given that they were neither disparaging nor disloyal.” See, NLRB v. Electrical Workers Local 1229, 346 U.S. 464 (1953) (sometimes referred to as the “Jefferson standard.”). The Board then examined the actual content of the posting and determined that, while critical of the employer’s policy, it did not rise to the level of a message that would otherwise be found to have lost protection.

On the other hand, the Land Rover posting was not protected because the employee acted alone. There was no prior discussion with any other employee and the posting was effectively simply a disparaging description of the incident for no other reason than to embarrass the employer.

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9 It was not entirely clear from the record, but it was clear that a competing dealer had apparently seen the posting about the car in the pond. Also, a “friend” of the employee had also seen the posting and told the employer about it. It was not clear how the employee had his security settings but the import of this is that once a “friend” gets ahold of it, the posting can presumably be re-broadcast under some circumstances and then almost anybody can see it - some friend indeed.
Hispanics United of Buffalo, 359 NLRB No. 37 (December 12, 2012)

The Board found that the employer had violated Section 8(a) (1) when it fired 5 employees who had made somewhat disparaging remarks about a co-worker on their Facebook pages. There an employee sent text messages to a co-worker complaining about the job performance of yet another employee indicating her intent to complain to management about that co-worker.

The recipient of the text then posted the message on her Facebook page and invited other employees to comment about the message. The employee sent text messages to co-workers accusing them of not performing their jobs. Another employee then posted a message on Facebook naming that employee as “feeling that we don’t help our clients enough” and that she had “had it.” She then asked others, “how do u [sic] feel?”

Four employees responded criticizing the person who initially sent the text – essentially claiming that this person’s performance was deficient as well and pointing out the irony of her complaining about anybody else. These messages were apparently sent to the original texter somehow and she responded asking the person who posted the message on Facebook to “stop her lies.” This was a somewhat convoluted scenario but suffice it to say that these employees were complaining about each other in a scene reminiscent of those faded but oh so indelibly etched memories of 7th grade.

The co-worker somehow saw the post and complained about it to management. The employer then fired the 5 employees who had commented about his.

A majority of a split Board ruled that the 5 employees were engaged in concerted activity and that the communications were protected. The employer had argued that the comments were “cyber-bullying” and prohibited by its policy against such communications leveled at co-employees.

The majority also ruled that the postings were both concerted pursuant to the holdings in Meyers Industries (Meyers I), 268 NLRB 493 (1984), Revd. sub nom, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand Meyers Industries (Meyers II), 281 NLRB 882 (1986), aff’d. sub nom, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In these cases, the Board explained that an activity is concerted when an employee acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

The Board called this a “textbook example of concerted activity,” even though it transpired on a social network platform. The discussion was initiated by the one coworker in an appeal to her coworkers for assistance. She surveyed her co-workers via Facebook on the issue of job performance to prepare for an anticipated meeting with management.

The Board also held that these communications were for mutual aid and protection and were simply seeking to protect themselves from the criticisms of their job performance they thought might be reported to management. The Board also found that the employee statements relating to staffing levels protected where it was clear from the context of the statements that they implicated working conditions. This finding of protected activity does not change if employee statements were communicated via the internet. See, e.g., Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enf’d. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App’x 783 (9th Cir. 2009). While these comments were really more aimed at undercutting the credibility of the person who initially accused them of poor performance the Board agreed that this was protected.

It should be noted that one member dissented and would have held that these postings were not protected because in his mind they were simply criticizing a co-worker rather than protecting themselves.
Finally, as the third part of the analysis, the Board found that the postings were not so “opprobrious” as to lose their protection. Even though there was some coarse language in them, the essential feature, in the Board’s eyes, about these postings was that it was for mutual protection and were “innocuous.” This obviously will depend on the facts, but one could easily imagine a posting that would appear to be for mutual protection but also crosses another separate line that might take it out of the realm of protected and concerted activity. For example, a posting that complained about the attitude or tactics of a supervisor with a call to contact a union, but which also threatened to kill him might not pass the third prong of the analysis.

**Purple Communications, 361 NLRB No. 126 (2014)** the Board overturned its longstanding rule in *Register Guard*, 351 NLRB 1110 (2007), enf’d in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The Board ruled that employees are allowed to use the employer’s e-mail during non-work time for the purpose of engaging in concerted activity under Section 7.

The NLRB held “The workplace is ‘uniquely appropriate’ and the ‘natural gathering place’ for such communications, and the use of email as a common form of workplace communication has expanded dramatically in recent years. Consistent with the purposes and policies of the Act and our obligation to accommodate the competing rights of employers and employees, **we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.**” (Emphasis added).

In *Purple Communications*, the employees used e-mail in their regular duties and the employer’s policy read as follows:

“Prohibited activities - Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:

Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.”

It was apparent that the latter prohibition was directed at union activity. The Board ruled that this policy violated the Act and overruled prior Board decisions that held that employees have no statutory right to use their employer’s email systems for Section 7 purposes. The Board recognized that e-mail is now recognized as the main way that employees communicate with each other.

The Board was careful to limit its holding to the following factors:

“First, it applies only to employees who have already been granted access to the employer’s email system in the course of their work and does not require employers to provide such access. Second, an employer may justify a total ban on non-work use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. Finally, we do not address email access by nonemployees, nor do we address any other type of electronic communications systems, as neither issue is raised in this case.”

**Three D d/b/a Triple Play Sports Bar and Grille, 361 NLRB 31 (August 22, 2014)** the Board ruled that “likes” on Facebook can be considered concerted activity. The employer had fired two employees for “liking” what another employee had said on Facebook about the employer’s tax withholding practice, some of which had cost the employee’s some money.
The employer argued that the act of clicking “like” on the Facebook page was not concerted activity but the Board ruled that in this case that it was. There was further an ongoing discussion about the tax issues both in person and on the Internet among employees, which also supported the finding of concerted activity. See, e.g., Bland v Roberts, No. 12-1671 (4:11-CV-00045-RAJ-TEM, (4th Cir. 2013).

The Board ruled that the face-to-face type of confrontation found in Atlantic Steel 345 NLRB 814 (1979) was inapplicable but that they did still have to determine whether the Facebook posts were so opprobrious as to lose protection under the Act. The Board cited Jefferson Standard, 94 NLRB 1507 (1951) and its progeny for this determination.

Here the comments were not disparaging per se and were not directed at the public. They also disclosed the existence of an ongoing labor issue concerning the tax withholding practices. The Board also cited its recent decision in Valley Hospital, supra as well in support of the conclusion that the comments were not so disparaging as to lose protection under the Act.

Hills & Dales Gen. Hospital, 360 NLRB No. 70 (Apr. 1, 2014). The case challenged the facial validity of workplace rules in the hospital’s Values and Standards of Behavior Policy.

The policy contained the following rules: employees will not make negative comments about fellow team members including co-workers and managers; employees will represent the employer in the community in a positive and professional manner in every opportunity and employees will not engage in or listen to negativity or gossip. The rules were developed by the Hospital with direct input from employees who were unhappy with the back stabbing and back-biting in the workplace.

The Board found that all three rules were overbroad and ambiguous and that they violated Section 8(a) (1). As in the cases cited above, the general discussion was over whether these types of very broad and general rules might chill an otherwise protected discussion about terms of employment.

World Color (USA) Corp., 360 NLRB No. 37 (Feb. 12, 2014). The Board adopted the judge’s finding that the Respondent violated Section 8(a)(1) by maintaining an overbroad a hat policy that employees would reasonably understand to prohibit union caps. The Board reversed the judge’s finding that the Respondent also violated Section 8(a)(1) through statements to an employee about the employee’s Facebook posts which were not shown to be protected concerted activity. The Board amended the judge's recommended Order in accordance with Guardsmark, LLC, 334 NLRB 809 (2005), enf'd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), to require the Respondent to rescind the unlawful hat policy and to revise its handbook to exclude that policy.

OTHER CASES DISCUSSED IN THE GC MEMO OF AUGUST 18, 2011

The General Counsel also considered 9 additional cases in its Memo of August 18, 2011. One case involved an employee of an ambulance service who was asked to prepare a report regarding a customer complaint against her. She asked for but was refused union representation and later posted a critical remark on her Facebook page. That in turn got several supportive comments from co-workers who saw the Facebook posting.

The Board determined that the employer’s policy, which prohibited making disparaging remarks when discussing the company or supervisors, and from depicting the company negatively in any media, including but not limited to the internet, without company permission, was unlawful and overbroad. It also ruled that this was concerted activity and asserted Weingarten rights. It was therefore protected and concerted.
Finally, even though the post referred to the supervisor as a “scumbag” it did not rise to the level of a post that was so offensive as to lose its protected status. See, *Atlantic Steel*, NLRB 814, 816-817 (1979). See also, American Medical Response, AMR, discussed in Advice Memorandum, Office of the General Counsel, American Medical Response of Connecticut, No. 34-CA-12576 (N.L.R.B. Oct. 5, 2010). (The parties settled that case, but the implication was clear that the NLRB would be involved in cases involving terminations for social media posts.

In another, an employee posted comments on Facebook critical of the employer’s tax withholding policy and practice. Some employees responded, one clicked “like” thus indicating at least some tacit agreement with the comments made and at least two customers responded to it. The post called the employer an “asshole.” The posting employee as well as the employees who responded were discharged.

The GC found that the postings were concerted and the discharges illegal. Further, the policy that prohibit “inappropriate conversations” was also illegal and overbroad and would reasonably be understood to prohibit protected activity.

Not every case involving a post on social media is protected. In fact, the GC dealt with several where postings were either found not to be concerted or where the postings were not related to working conditions.

In one such case, a bartender was fired for critical comments on Facebook about sharing tips with waitresses. In a somewhat surprising result, at least to me, the posting was not considered protected because it was not shared with any other employees. While it was about working conditions, it was not discussed with other employees and there were no other physical meetings between employees at which the topic was discussed.

In yet another case, a reporter for a local newspaper posted highly critical comments on Twitter about his editors. Others were sexual in nature, disparaged a local television station.

In this particular case the GC determined that this post was not protected. It was not concerted and did not relate to working conditions. It was merely disparagement of various people the reporter apparently did not like or with whom he had a disagreement.

In another, an employee posted critical comments about her employer on her U.S. Senator’s Facebook. Not sure whether that was a plea of some sort of help in remedying a perceived transgression or not, but the GC determined that this also was not concerted. There was no evidence of discussions about the issue that had been posted with any other employee and the postings were not aimed at initiating group activity.

In another, a retail store employee was fired who posted a very disparaging remark about a supervisor after the supervisor had admonished her for mistakes with regard to merchandise placement and pricing. This posting was not considered concerted and the GC determined that they were merely personal to the employee and did not seek group action. It was merely a personal gripe about the way she was treated.

The GC also issued a Memo dated May 30, 2012 in which additional guidance was provided. The GC stated, as in the past, that “rules [regarding use of social media] that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.” See, GC memo of May 30, 2012 at page 3.

The GC dealt with a policy that simply read:

“Don’t release confidential guest, team member or company information.”
While that sounds fairly innocuous and straightforward, the GC found this section of the handbook to be unlawful. The instruction that employees not release confidential guest, team member or company information would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves. Citing Cintas Corp., 344 NLRB 943, 943 (2005), enf’d. 482 F.3d 463 (D.C. Cir. 2007).

The GC in another case discussed in the May 30, 2012 Memo, noted that an admonition to be sure that all communications sent out on social media are “completely accurate and not misleading” was overbroad because it could reasonably be interpreted to apply to discussions about, or criticism of, the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy did not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity. It was not entirely clear how much guidance one might need in order to pass muster, but the GC has indicated that more specifics are necessary to avoid a finding that the policy is overbroad and unlawful.

The question for us as arbitrators is of course how we might interpret these or enforce them in the face of a challenge to their contractual validity by a union defending a discharge. It seems that the real question will be whether the message under consideration crossed a line somewhere against threats, disclosing confidential information about clients, patients, co-workers or customers or was so disparaging to the employer’s business that it lost protection.

FREE SPEECH ISSUES IN THE PUBLIC SECTOR

One possible substantive difference between cases in the private sector and those arising out of the public sector is the argument that the fundamental right of free speech protects certain communications. This right is of course not absolute; just as yelling “fire” in a crowded theater is not. Threats and other sorts of obscene or inappropriate comments are likely to not fall into this category.

Comments about political candidates or the policies of government might well enjoy greater protection even though these same kinds of statements made about a private sector employer might not. The obvious difference is that a private sector employer might well say that their employees have all the free speech they want but if they splash certain types of statements about the product or other employees, (subject to the discussion above regarding NLRA rights) they can’t work here anymore.

The Courts have long recognized that public sector employees have a right to free speech and the right to speak on matters of “public concern.” See, Pickering v Board of Education, 391 U.S. 563 (1968). However, that right is not absolute and public employees may not always have free speech rights in the same sense that members of the public do. See also, Garcetti v Ceballos, 547 U.S. 410 (2006), where the Court held, citing Pickering, that when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes and are not thus entitled to the protections under the Constitution afforded to private citizens.

Garcetti held that two inquiries are necessary. First, is the employee speaking as a private citizen on a matter of public concern? If not, the employee has no First Amendment rights. If yes, then the question is a balance of whether the government had adequate justification for treating the employee differently from any other member of the public based on the employer’s need to operate efficiently and effectively. See also, Connick v Myers, 461 U.S. 138 (1983).

Second, is the speech made pursuant to official duties? If so, the speech may not be protected. It is a bit of a sliding scale – the closer one gets to a comment about their official duties the less likely it’s protected. These will be very fact specific cases. An arbitrator may have to weigh the impact of the speech on the operations. Did it adversely impact an investigation or generate bad publicity?
These rights are not absolute and do come with some limits – much like screaming “fire!” in a crowded theater or threatening to harm or kill someone. The public employer also has rights to promote efficiency and effective public services and these rights have to be balanced.

One Court noted that “Although government employees do not forfeit their constitutional rights at work, it is well established “that the government may impose certain restraints on its employees’ speech and take action against them that would be unconstitutional if applied to the general public.” See, Adams v. Trustees of the Univ. of N.C.-Wilmington, 640 F.3d 550, 560 (4th Cir. 2011).

One question that arises in the context of social media is what constitutes “speech?” Does merely clicking “like” or hitting the “thumbs up” or down icon equal free speech? One Court said it might. See, Bland v Roberts, No. 12-1671 (4:11-CV-00045-RAJ-TEM, (4th Cir. 2013). See also Three D d/b/a Triple Play Sports Bar and Grille, 361 NLRB 31 (August 22, 2014) discussed above.

In Bland, the 4th Circuit overturned a lower Court ruling and held that “liking” something on Facebook was protected. (The lower court’s ruling is found at 857 F. Supp. 2d 599.) There, several employees in a sheriff’s department hit “like” on a Facebook page of the Sherriff’s opponent. When the Sheriff was re-elected, those employees were fired. The lower court granted summary judgment in favor of the sheriff, but that was reversed by the 4th Circuit.

Thus, while these too will be fact specific in terms of what constitutes speech, the act of hitting “like” may well be considered speech even though the employee was merely agreeing with what someone else said.

The issue of whether an employee can be disciplined for making certain comments about a governmental authority becomes balancing whether the employee’s right to free speech against the government’s right to maintain an orderly and efficient operation. The Court in Bland v Roberts, (4th Cir. 2013) (appeal from 857 F. Supp. 2d 599 (2012) noted as follows:

“The Supreme Court in Connick v. Myers, 461 U.S. 138 (1983), and Pickering v. Board of Education, 391 U.S. 563 (1968), explained how the rights of public employees to speak as private citizens must be balanced against the interest of the government in ensuring its efficient operation [and] held that in order for a public employee to prove that an adverse employment action violated his First Amendment rights to freedom of speech, he must establish (1) that he was speaking as a citizen upon a matter of public concern” rather than “as an employee about a matter of personal interest; (2) that “the employee’s interest in speaking upon the matter of public concern outweighed the government’s interest in providing effective and efficient services to the public; and (3) that the employee’s speech was a substantial factor in the employee’s termination decision.” See also, McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998).

The Bland Court discussed the factors to be considered in determining the second prong of the test – i.e. the balance between the employee’s interests in speaking out on a matter of public concern – like an election – and the government’s interest in providing services and noted as follows:

Factors relevant to this inquiry include whether a public employee’s speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee’s duties; (5) interfered with the operation of the [agency]; (6) undermined the mission of the [agency]; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the [agency]; and (9) abused the authority and public accountability that the employee’s role entailed. See, also, Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006).
Accordingly, “a public employee who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee.” Bland v Roberts, slip op at page 10, McVey, supra at 278.

Arbitrator Sharon Imes in a very well written discussion of this topic posited these three prongs as well: First, is the speech made pursuant to their official duties? If so then the speech may not be protected.10

Second, does the speech cover a matter of public concern within the community for either social or political reasons? If so, the speech may be protected.11

Third, if the speech is a matter of public concern, does that outweigh the employer’s interests in providing services? If so, it may be protected. See discussion above regarding the factors that can be considered.

Obviously, these cases will be very fact specific.

See also, Ehling v. Monmouth-Ocean Hospital Service Corp., No. 2:11-cv-03305 (D.N.J. Aug 20, 2013). There the Court held that private Facebook posts are protected under the Stored Communications Act, and supervisors who surreptitiously go on to a Facebook page or gain access to it without the users consent or knowledge do so illegally under that Act. However, postings that are forwarded to another by a so-called “frenemy” are not. The Court held that it was permissible to discipline an employee for a posting forwarded to the employer by a “friend” on the employees Facebook page even though the employee limited viewers to only his friends on Facebook).

SOME ARBITRAL RESPONSES

Arbitrators sometimes take concerted activity issues into account in determining whether to impose discipline in these types of cases, but some do not, focusing instead on whether the substance of the message violates another employer policy or infringes on some legitimate employer interest. Still though the notion of whether the policy itself is overbroad or potentially chills concerted activity may well become a much greater issue in these cases. There have been a few arbitrations that have grappled with this issue.

1. In State of Ohio, Dep’t of Corrections and Ohio Civil Service Employee’s Local 11, unreported (March 6, 2013 Pincus) the arbitrator dealt with a posting on social media by an Ohio State employee. At the time the State was considering the same sort of legislation that Wisconsin had recently passed essentially outlawing unions in the public sector. To say that this was a matter of public concern was an understatement.

The grievant posted a Facebook message that read as follows: “OK, we got Bin laden … let’s go get Kasich next … who’s with me?”

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10 For example, does a police officer have the right to Tweet about how an arrest was bungled by the prosecutor thus allowing someone the cop felt was guilty to walk? The Pickering and Garcetti, supra, holdings suggest that this is not protected activity under the 1st amendment.

11 Does a city employee get to post something on Facebook criticizing a city decision to use taxpayer dollars to fund a privately-owned sports stadium? The answer may depend on whether the post was made in the scope of the employee’s employment and on the actual text of the post itself.
Mr. Kasich was the Governor of the State of Ohio at the time and a proponent of the legislation. The Arbitrator found that the posting was seen by 17 people and indicated that they “liked” it. Four of them worked in the same facility as the grievant who posted the Facebook message. It was not clear from the opinion but somehow management got wind of this message and referred the matter to law enforcement. They declined to prosecute.

The grievant was fired for what management termed a threat against the Governor. The arbitrator reinstated the grievant but without back pay. The union raised the argument that this was protected activity, but the arbitrator disagreed and ruled that the grievant was acting solely on behalf of himself and did not initiate the discussion through group action – even though it apparently called for group action.

The union also raised the argument that the message was not truly a threat but merely a call to vote Kasich out of office. The arbitrator regarded that as “superfluous and misplaced.” The arbitrator found that the association of “Bin Laden” used in this context constituted a threat and was “ripe for discipline but not removal.”

The arbitrator found that the words used were nothing more than empty and that there was nothing that was perceived as an actual threat to do bodily harm to the Governor. However, he also found that the words were not a mere joke and that the grievant’s Facebook page identified him as a public employee and identified the facility where he worked. He found that the totality of evidence brought discredit to the employer and that some disciplinary consequences were appropriate. The employee was reinstated but without back pay or benefits.

2. In *City of North Bay and Dade County PBA, 131 LA 275 (Wood 2012)* the arbitrator ruled that a police officer was properly disciplined for posting a message to the Facebook of a mayoral candidate, apparently identifying himself as a city employee and saying that the city needed a change of leadership.

The City had a policy prohibiting employees from “utilizing their positions to influence or attempt to influence the results of a City Commission election.” There was also a policy that stated: “while representing the Department, either on or off-duty, employees shall not engage in any political activity.” Another read, “while as a private citizen, employees shall not state or imply in any way that their political views represent the North Bay Village Police Department.”

The employee, a police officer, posted a message on a mayoral candidate’s Facebook page that read as follows:

“I work for the city and I will tell you that a change is really needed. Thanks for stepping up!!!”

A few days after this posting was made a person who was on the city commission discovered it and reported it to the police chief.\(^\text{12}\) After an investigation the grievant was given a three-day suspension for violating the above policy. He had been told in prior years not to engage in this sort of activity after he went door to door campaigning for various candidates.

The union argued that the prohibitions were unconstitutional prior restraint on the grievant’s free speech rights and that his message was not political in nature. Thus, there was no disobedience of his supervisor’s orders.

\(^\text{12}\) The decision does not make it completely clear if the grievant was identified by name but apparently, he was identifiable enough that it was clear he made the posting on the candidate’s Facebook page.
The arbitrator adopted a slightly different set of tests to analyze restrictions imposed by public employers. First, did the employee make a statement of public concern? If so, then the second prong is whether the restriction placed on speech was necessary for the employer to operate efficiently. See discussion of Bland v Roberts, supra.

There must thus be a nexus requiring the employer to show that the off-duty conduct 1. Harms the employer’s business; 2. Adversely affects the employee’s ability to perform his job; or 3. Leads others to refuse to work with the employee. These are the standard off-duty conduct nexus tests frequently used to determine whether off-duty conduct is properly disciplinable under a just case analysis. No surprises so far.

The arbitrator rejected the union’s argument that the speech was not political. She considered a number of factors and ruled that the size of the city – some 6000 residents, the fact that one of the main issues in the election was the conduct of the police department in general; that the city manager and police chief had emphasized the need to keep the police department politically neutral in the election; the fact that the posting was made to one candidate’s Facebook page and that all of the postings on that page were endorsements of the candidate.

Further, the evidence in that case showed that the grievant was a well-known police officer and identified him as an employee of the city. Based on that she ruled that the speech was indeed political and led to the conclusion that the grievant’s views represented those of the police department in violation of the policies set forth above.

The arbitrator reduced the 3-day suspension to a reprimand for other reasons.

What I find interesting is that despite the clamor about free speech and protected activity, in the final analysis it appears that if the message is disparaging or threatening, arbitrators impose discipline without much regard to all the principles discussed above. It’s about the message itself it appears.

3. Vista Nuevas Head Start and Michigan AFSCME Council 25 #1640, 129 LA 1519, AAA 54 390 00061, (Van Dagens 2011) it was apparent that the arbitrator considered the NLRB’s ruling on the issue of concerted activity in dealing with a social media post.

The grievant worked as a head start teacher and started a Facebook group called, “Don’t U hate it when …” and invited people who worked for the facility to share their issues and concerns/gripes about the work and almost anything that bothered them. The description of the page was “Just for Fun/Inside Jokes.”

Only 4 people joined the group, including the grievant, and they posted concerns about supervisors being late and other issues. The postings show a lot of fairly coarse language. The privacy settings were set to “Secret. No public content. Members can see all content.”

The grievant was fired after the grievant’s ex-husband took a screen shot of the postings and sent it to the employer. The employer contended that the messages contained information about teachers, parents and even students that were disparaging and insulting. The employer also cited Baker Hughes, 128 LA 37 (Baroni 2010) in support of the claim that speech of this nature on a public blog is equivalent to any other communication that forms the basis of discipline.

The union contended that these were intended to be private posts not accessible to anyone except the members of the group. This was thus not a public blog at all but one that was intended to be private and limit to a very small group of people. The fact that the ex-husband got the screen shot through nefarious means should not result in the grievant being fired. She apologized for any harm she did and never intended that these private thoughts be shared with the world.
The arbitrator ruled that there was no question that the grievant created the Facebook page and next turned specifically to whether this was protected concerted activity. The union argued that the grievant and her co-workers pointed out that their supervisor frequently came to work late and complained that she was never disciplined or reprimanded. However, there were other posts that were very insulting to parents and students and other teachers that were not about working conditions or for mutual aid and protection – they were just insults.

The arbitrator found that there was nothing in the communications that showed that these employees were seeking to band together for mutual protection. She rejected the union’s concerted activity claim.

The arbitrator also found that there was a nexus between these posts and the work. She also found that the vulgar and profane language used by the grievant in her posts would never be tolerated if they had been uttered in the classroom or around the school. Further, she discussed the notion of public versus private speech. In the Baker Hughes case cited by management the evidence showed that the postings were accessible by a wide audience and was therefore public.

In Vista Nueva, the arbitrator found the blog was entirely private and had been accessed only through an unwelcomed invasion of privacy. Despite that the arbitrator was persuaded that the posts were so insulting and disparaging that they crossed the “line.” The arbitrator appeared thus to agree with the employer’s argument that “there is no reasonable expectation of privacy when it comes to the internet.” Further, once the employer found out about these they had to act.

The grievance was denied and the discharge upheld. Whether one agrees with that result given the facts or not, it is apparent that irrespective of all the pronouncements regarding pubic versus private conversations the arbitrator focused on the content and how that impacted the workplace.

4. **Rice County, MN and McBroom, Minnesota BMS #19-PA-0690 (Jacobs 2018)**

A deputy posted a message on social media in response to a news story about a settlement reached with a woman whose fiancé was killed by a police officer in a city near Minneapolis. His post was on a public website. The deputy was also identified on his own Facebook page as a Rice County Minnesota deputy sheriff with a picture of him in his uniform standing next to a county owned squad car. This was also a clear violation of County policy.

The post read as follows: “She’ll have that [i.e. the money from the settlement] spent in 6 months on crack cocaine.” There was another post only seconds later that read: “I hope she loses all her State and County Aid now that she has this cash.” This was posted under the veteran’s Twitter handle as “Tom McBroom Sr @McBroomSE”

He repeated his earlier comments approximately 20 minutes later with a post that read as follows: “She needs to come off County and State Aid now that she has some cash. It’ll be gone in 6 months on crack cocaine.”

There was no evidence whatsoever that the woman he was referring to was ever on crack cocaine nor any evidence that she was ever accused of such things.

It did not take long for the media to latch onto this for some reason and when a reporter called him and ask if he was the person who posted the messages, he lied to her and said he was not a law enforcement officer; he was a general contractor. This was untruthful and he later recanted that, admitted that he indeed had posted the messages and said he was “just screwing with her.”

When he was interviewed about why he had said those things he essentially doubled down and said that “history” taught him that all this was likely true.
The post went viral and the sheriff’s office was deluged with angry messages – mostly from out of town people, but many from near the County itself. The deputy was demoted from Sergeant to deputy.

The demotion was upheld in spite of the free speech allegations, under the Pickering and Garcetti analysis. See, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), *Connick v Myers*, 461 U.S. 138 (1983) and *Garcetti v Caballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). This line of cases holds that a person in public employment does not enjoy unlimited rights of free speech and ally a balancing test – balancing the rights of the employee against the harm done to the public employer. It was found that the free speech rights were outweighed by the adverse impact on the department – and on law enforcement in general.

The statements made were not on a matter of public concern and were just insulting to the young woman. There was also a finding of a nexus to the workplace even though the statements were made off-duty on the deputy’s private computer.

The demotion was eventually affirmed by the Minnesota District Court in *McBroom v Rice County*, 66-CV-18-2288 (MN 3rd Jud. Dist. 2019).

5. *L’Anse Creuse Public Schools and Michigan NEA Local 1, 125 LA 527 (Daniel 2008)*

This case demonstrates the risk people take when off-duty and someone else snaps a picture of them doing something that offends the tender sensibilities of their employer.

The grievant, a teacher in a middle school, while off-duty (in fact it was during the summer) went to a festival that is well known for drinking and other sorts of what the arbitrator called salacious behavior. In order to get a drink of alcohol one must stand before an anatomically correct mannequin and pretend to perform sex acts to get a shot.

The grievant did this, along with literally hundreds of others, and while she was getting her drink one of the “friends” snapped a picture of her without her knowledge and posted it on a website – 2 years after the event. The school found out about it and rumors spread rapidly around the school.

Many students saw the picture that had been posted and, as one can imagine, this went quickly viral. The school placed the grievant on paid suspension and the union grieved claiming that the suspension was tantamount to a disciplinary action even though her suspension was with pay and contractual benefits.

The teacher claimed that she had no knowledge of the picture, had not given consent to taking it much less posting it on a public website and that her conduct was off-duty and was neither illegal nor immoral.

The arbitrator found that the school would not have had cause to fire the teacher under a just cause standard but noted that this case did not involve a true termination, but rather a suspension pending consideration of termination under state law, known as the Tenure Act. The arbitrator noted that the tenure act contemplates that a suspension may be necessary in order to continue orderly school operations. The school’s action was determined not to be disciplinary, but rather were made pursuant to the tenure act and did not constitute discipline. The grievance over the suspension was denied.

Under Michigan’s Teacher Tenure Act, a commission decide to overturn the discharge since the conduct was off-duty, did not involve students or parents and had occurred two years before the pictures were even posted.

Still though, one wonders how such posts might affect people doing something that might be a bit off putting but is in no way illegal or even immoral.

HOW DID THE EMPLOYER GET THE INFORMATION? – FEDERAL STATUTES PROTECTING PRIVATE CONVERSATIONS

Sometimes the issue may well be not what was posted but rather how the employer came across it. Courts have now dealt with the Federal Stored Communications Act (or “SCA”), 18 U.S.C. §§ 2701-11. We will discuss two cases in which information that the person posting it thought was private but somebody got it anyway. These are by no means the only such cases out there and it is not the intent of this discussion to provide a law review article about this topic. These cases do however provide food for thought and some guidance as to issues that might arise before an arbitrator dealing with discharge and whether the evidence is admissible or whether it should be considered at all due to the method by which it came to light.

As discussed herein, it appears that many arbitrators frequently focus on the message irrespective of how it got there and whether the employee should be disciplined for these messages given the nature of what they actually say rather than how it was discovered. This is not after all a criminal proceeding subject to the “fruit of the illegal tree” type of analysis.

Konop v Hawaiian Airlines, 302 F.3d 868 (9th Cir 2002).

Mr. Konop, a pilot for Hawaiian, maintained a website where he posted bulletins critical of his employer, its officers and the incumbent union. Many of those criticisms related to his opposition to labor concessions that Hawaiian sought from the union. Because the union supported giving management concessions to the existing collective bargaining agreement, Konop encouraged others via his website to consider alternative union representation.

He controlled access to his website by requiring visitors to log in with a user name and password. He provided user names to certain Hawaiian employees, but not to managers or union representatives. In order to get a password and view the site, an eligible employee had to register and consent to an agreement not to disclose the site’s contents.

One of the airline’s vice presidents began accessing the site using another person’s name – another airline employee. That person had never logged onto the site nor had he filled out the registration form. In essence the company official was fraudulently accessing the site for the purpose of finding out what the employee was saying about the airline and its management.

Mr. Konop filed suit claiming violations of various federal and state laws protecting illegal wiretaps etc. The Court analyzed the Stored Communications Act (SCA) 18 U.S.C. §§ 2701-11 and noted that it was not a model of clarity. The Court went through a very thorough analysis of the law and how its words applied to such communications.

The Court held that under these facts the communications were covered by the SCA and reversed the granting of summary judgment in favor of the airline. The import of this is that if there is evidence that the employer gained access to a Facebook page or other social message through some nefarious or deceitful means, there may be some argument by the union that the arbitrator should refuse to admit it or discount its probative value.
However, as discussed below, irrespective of how one gets the information, is it still OK to threaten to kill someone or disparage the employer, its managers, customer/clients or products? Finally, if the information gets out through a non-deceitful way, the protection is likely lost anyway, and arbitrators can accept the evidence for what it’s worth.


The Court held that if the information is obtained through a “friend” it does not violate the Stored Communications Act. The case arose out of a lawsuit were an employee had been disciplined for Facebook postings and she filed various claims against the employer for doing so. One of the claims dealt with whether there had been a violation of Federal law for accessing her Facebook posting without her consent or knowledge. On the facts presented, the Court rejected that part of her claim.

The Court did an excellent job explaining how Facebook works and the way in which users can, or are prohibited from, viewing the posts of other Facebook users. It is an excellent primer for those of us who have a Facebook page somewhere but have never used it and now can’t find it.

The plaintiff had a Facebook account with approximately 300 Facebook friends. She selected privacy settings for her account that limited access to her Facebook wall to only her Facebook friends but did not add any of the employer managers as Facebook friends. However, the Plaintiff added many other employees who worked there as friends, thus granting them access to her Facebook account and message wall.

She also posted various messages to her friends’ walls as well. Unbeknownst to the grievant one of her “friends” took screenshots of her messages and gave them to the employer.13 The employer was found not to have initiated this and did not ask the friend to pass along the screenshots of the grievant’s Facebook page.

On June 8, 2009, Plaintiff posted the following statement to her Facebook wall:

> An 88 yr old sociopath white supremacist opened fire in the Wash. D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? And 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards….go to target practice.

The employer got this message through the friend and suspended the employee. She then filed a complaint with the NLRB. The Board found no privacy violation because it was sent unsolicited to the employer by a “friend.”

The Court also rejected the claim that her posts were covered and protected under the Federal Stored Communications Act (SCA), 18 U.S.C. §§ 2701-11. The Court went through an exhaustive analysis of the SCA and its history but eventually found that private Facebook wall posts fall within the purview of the SCA.14

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13 In Facebook lingo, these kinds of people are referred to as “frenemies.” You can sure see why.

14 The *Ehling* Court noted, as did the Court in *Konop*, that the SCA was passed in 1986, well before the advent of most social media and at a time when the Internet was in its infancy. Both Courts asked Congress to update the statute to take account of the game changing technology. Otherwise, the Courts noted that “until Congress brings the laws in line with modern technology, protection of the Internet . . . will remain a confusing and uncertain area of the law.” *Ehling* slip op at page 7 n. 2. See also, *Konop*, 302 F.3d at 874.
Because the posts were given voluntarily by someone who had been given access to the plaintiff’s account the Court found no violation of the SCA. The Court relied on the “user exception” to the SCA that allows access where it is “authorized (1) by the person or entity providing a wire or electronic communications service; [or] (2) by a user of that service with respect to a communication of or intended for that user.” 18 U.S.C. §2701(c). Ehling, slip op at page 10. There must be no coercion.

Here all of those elements were present and there was no evidence of coercion to gain access. Thus, access was authorized pursuant to the statute. The Court granted summary judgment in favor of the defendants on that part of the complaint. Keep in mind that this case was not a labor case but provides an instructive analysis of the kind of arguments one might see, or make, in an arbitration.

EVIDENCE ISSUES – ARE THESE COMMUNICATIONS EXCLUDED FROM ARBITRATION? WAS THERE SOME SORT OF EXPECTATION OF PRIVACY?

There is a difference of opinion regarding the admissibility of wrongfully obtained evidence. This very topic was discussed at a recent NAA meeting and the divergence of opinions on the admissibility of such evidence was evident there.15

First, as the discussion above shows, it is difficult to determine whether the information was truly “illegally” obtained. The Courts may take years to determine that and there might well not be a finding on that question by the time of the arbitration.

Second, is there a middle ground, i.e. somewhere between illegal and just plain deceitful? There have been few cases that have dealt with that but we might expect to have that question raised where the employer gets the information from a truly strange source. As one might imagine, there is little expectation of privacy in things connected with the Internet. Once it is out there the person posting it has little or no control over where it goes or who sees it. See, L’Anse Creuse case cited above, where a picture was taken but posted 2 years later and resulted in the termination of a tenured teacher. The termination as eventually overturned but not before several years had passed and a fair amount of angst had been endured.

Third, does it matter? The labor side advocates would assert that the employee does not give up privacy rights as a condition of employment. They argued that breaking into a locker is thus no different than “breaking” into a person’s Facebook account without access to it and that such evidence should be excluded.

Or is it? The locker is typically on the employer’s premises whereas, unless the employee is using an employer owned computer on company time, many Facebook posts are made on personal computers off-duty? That may make a difference.

Management advocates frequently assert that arbitration is a creature of contract and that any statutory issues are handled outside that forum. If the arbitrator determines that the evidence is probative and material it should be admitted. They often point to cases of threats or truly disparaging and damaging posts that demonstrate a real threat to security or personal safety that cannot in this day and age be ignored.

15 See, THE ANTI SOCIAL NETWORK, FACEBOOK, SMART PHONES AND OTHER SOCIAL MEDIA IN THE WORKPLACE, PROCEEDINGS OF THE 65TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, Ch. 6, page 155, 182-183 and n. 61. This discussion about wrongfully obtained evidence has been ongoing since 1966. See Luskin, et. al, PROBLEMS OF PROOF IN ARBITRATION, PROCEEDINGS OF THE 19TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, (1966).
Elkouri sums it up this way:

“Reported arbitration decisions reveal that arbitrators differ significantly in their views as to the use of such evidence, though the inclination to accept and rely on it appears to be fairly strong.” Elkouri and Elkouri, How Arbitration Works, BNA Book, 6th Ed at page 399. See generally, Elkouri, 5th Ed at pages 454-458.

This question has been ongoing for decades and may not be definitively resolved any time soon. My guess is that – it will depend on the facts of each case. Go figure.

**DID THE MESSAGE VIOLATE ANOTHER POLICY – I.E. THREATS, DIVULGING CONFIDENTIAL OR PROPRIETARY INFORMATION?**

As discussed herein, the State of Ohio, Dep’t of Corrections and Ohio Civil Service Employee’s Local 11, unreported (March 6, 2013 Pincus) case, demonstrates the tendency to look at the message rather than the medium. A threat is a threat and does it matter how it was made; i.e. whether made sitting at a bar after work or on a Facebook page sitting at home after work? If there is a threat that is determined to be serious and potentially dangerous in nature, it is a threat and punishable as such.

In *AirTran and Assoc. of Flight Attendants, 131 LA 254 (Goldstein 2012)* the arbitrator was faced with the allegation that a flight attendant made threats against co-workers on a Facebook page. The employer had a handbook requiring employees to conduct themselves respectfully and not reflect adversely on the company, crew members, customers, partners and competitors.

The grievant was a flight attendant who had a dispute about boarding a flight some years before the posts in question. Later, in 2010 the grievant posted critical comments on this Facebook page about scheduling that read as follows:

“Better make it home at a decent hour tomorrow otherwise scheduling better watch their back. I need a drink. That’s its [sic] scheduling is dead. They’re all fucking dead!!”

“Thanks for drafting me assholes. I should call SOL when I get to San Juan. I need lots of Vodka tonight!!” Dear Crew scheduling, please suck my d*** and rot in hell!! Im [sic] over you, tell your friends in planning that we just hired 200 people so there’s [sic] no reason to deny all of our Aug [sic] for low reserves. It’s getting quite ridiculous now.”

An anonymous screen shot of the posts were sent to the employer by e-mail with the screen shots attached. After an investigation, the grievant was given a three-day suspension and notice of termination warning.

The union argued that there was no credible threat. The employee was simply venting his frustrations with scheduling and never intended to take any action based on the comments. Further, the Facebook settings were private so only his friends could see the posts. The general public could not. The fact that someone got these, somehow, should not result in his discipline.

The employer of course argued that these were credible threats. They used the word “dead” and were more than mere venting even though no specific individual was mentioned, one can assume he meant the entire scheduling department. That, coupled with the grievant’s prior record, should be sufficient to warrant discipline.

The arbitrator ruled that the employer’s policy itself placed the grievant on notice of the rule against threatening comments or actions and that the fact that his Facebook settings were on the highest privacy setting did not provide an adequate defense on these facts. He stated that “the airline’s blogging policy rule gives specific notice to its employees of its position that blogging that was tied to the workplace would not be considered private.”
Further, the content of these posts grew out of the employment and were threatening in nature. It was clear that the statement, “scheduling is dead” was a major factor in the determination of just cause in this case.

The arbitrator also found a nexus to work even though these posts were off-duty since these threats were directed at co-workers. The grievant passed on his “private” thoughts about the airline and its scheduling department to friends, many of whom were employees. By doing so he lost any reasonable expectation of privacy.

Here the words used and the clear fact of the threats made were sufficient to warrant discipline. The arbitrator denied the grievance in its entirety. He relied largely on common sense rather than esoteric rules of law.

**IS IT THE MEDIUM OR THE MESSAGE?**

Electronic communications have greater potential for harm since they are instant and can go to thousands+ very quickly. One might wonder analytically if there is any difference between 5 guys sitting in a bar with their work shirts on griping about the company that is overheard by other bar patrons/locals from town versus a blog that goes out to anybody anywhere who wants to read it.

Still though if the very intent of putting it on social media IS to broadcast the message to a wide, potentially anonymous, audience the issue might well be the medium itself and the use of it.

The message is still the most important piece – what does it say, what was the intent behind it, what was the real harm, what is the potential harm?

We will have to grapple with all these issues, including how the information was obtained, what it says, whether there is a nexus between off-duty posts and work, whether there is a legitimate expectation of privacy and the probative value of statements once we know about them.

As the cases show, this is an emerging area of the law and one that is clearly a decade or so behind the current technology. For example, a program called Snap Chat allows one to send a picture that simply disappears after a few seconds. In that case, we are left with testimony about what it was and that may be about all.

These cases are going to come up more and more as employers use social media to find out what their employees are doing and saying while at home. Employees will likely to be dumb enough to post some very damaging information on these without thinking that someday, an employer, maybe even their current employer will look at it. As in all things, each case will depend on its facts.

**MARIJUANA RELATED ISSUES**

**INTRODUCTION AND SCOPE OF THE TOPIC**

As of January 8, 2018, thirty states and the District of Columbia currently have laws broadly legalizing marijuana in some form. Several others have legalized either medicinal or recreational use of marijuana, including Michigan. Clearly, it is apparent that attitudes toward marijuana are changing and that what was once considered a gateway drug to the worst form of addiction is now considered in many areas of the country as far less dangerous than that.

Still though, it is considered illegal under federal law and many states continue to ban it outright and criminalize its use and possession. Like alcohol, it can impair judgment and reflexes and, again like alcohol, which is certainly legal as well, its use can result in dangerous impairment on the job – whether they ingested it while on duty or not.
Many states and the District of Columbia have adopted the most expansive laws legalizing marijuana for recreational use. A majority of states allow for limited use of medical marijuana under certain circumstances. Some medical marijuana laws are broader than others, with types of medical conditions that allow for treatment varying from state to state. Louisiana, West Virginia and a few other states allow only cannabis-infused products, such as oils or pills. Other states have passed laws allowing residents to possess cannabis only if they suffer from select rare medical illnesses.


A number of states have also decriminalized the possession of small amounts of marijuana. In addition, final rules for recently-passed medical marijuana laws are pending in some states as are potential measures to legalize its use in others.

Our discussion today will not attempt to sort out the state laws or how the federal law may impact those. The discussion today will focus on the questions of when and under what circumstances drug testing may be conducted, the level of proof necessary to establish drug use and impairment, which are separate issues, and some arbitral responses to drug use by employees and how arbitrators deal with discipline issued to those employees who test positive for marijuana.

There is no question that drug use is a problem and has been for some time. Elkouri notes in the latest edition of How Arbitration Works, that some “studies estimate that 8.3 million American workers are drug users and cost their employers over $100 billion each year.” See Elkouri and Elkouri, How Arbitration Works, 8th Ed at 16.2.A at page 16-3, BNA Books (2016).

WHEN IS TESTING PERMISSIBLE?

SAFETY SENSITIVE POSITIONS: Reacting to several major disasters where drugs, and specifically marijuana were involved, Congress enacted the Omnibus Transportation Employee Testing Act of 1991 (OTETA), 49 U.S.C. 31306. There was opposition to the law based on the claim that the tests were an invasion of personal privacy, but the U.S. Supreme Court decision in National Treasury Employees Union v. Von Raab 17 effectively decided that at least for safety sensitive positions, the tests were valid. The Court upheld the U.S. Customs Service urinalysis drug test for employees applying for promotions or positions involving drug interdiction and requiring the employee to carry a firearm. Thus, for safety sensitive positions it is relatively clear that drug testing is permissible.

What constitutes a safety sensitive position may well be a fact issue for an arbitrator to decide. If there is an agreement between the parties the arbitrator may well be compelled to follow that agreement, whether the person was acting in a safety sensitive position or not.

For example, as in Von Raab, a person permitted to carry a firearm is certainly a safety sensitive position. What if the person is on light duty in a desk position but still tests positive? That might be an open question but if they are still licensed to carry, in my view they are still “safety sensitive” and subject to testing.

It is also clear though that the NLRB has ruled that the topic of drug testing in the workplace is a mandatory subject of bargaining and that the employer must bargain with the union before a drug testing policy can be implemented.

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16 Elkouri’s authors cite US Dep’t of Health and Human Services, National Household Survey on Drug Abuse 1998. See Section 16.2.A and fn 5, 6 and 7.
REASONABLE SUSPICION TESTING

What constitutes “reasonable suspicion” continues to be a thorny issue and one that will depend on the facts of each case. Some employers have policies regarding testing after certain work-related incidents, such as the discharge of a firearm or other work-related accidents. In these circumstances it is likely that the requirement of a test will be upheld. See, e.g. McLaren, Regional Medical Center, 120 LA 1579 (Daniel 2004).

Elkouri also cites to United Parcel Service, 126 LA 1088 (Draznin 2009) where the arbitrator found that the employer did not have reasonable suspicion to administer a drug test where the employee refused a job assignment because he claimed he was “too sick to do it.” There the labor agreement defined “reasonable cause” for a test, as “an employee’s observable action, appearance or conduct that clearly indicates the need for a fitness for duty medical evaluation.” Based on that definition, the arbitrator found that the mere statement about being too sick did not rise to that level.

In one other case, AFSCME and Lane County, Oregon, 136 LA 585 (Jacobs 2016) the managers smelled a strong odor of marijuana on an employee’s clothes during a meeting and requested that he be tested. In that case there was no objection to the test itself but it was clear that the odor was in that case enough to give reasonable suspicion for the test. See also, Kellogg Co., and bakery and Confection Workers, 135 LA 676 (Erbs 2015) where the arbitrator upheld the test based on observations by coworkers that the employee seemed impaired. He ruled that these individuals did not need to be trained in observation of drug impaired people.

Reasonable suspicion need not be individualized in all cases. In City of Ocala, Florida, 132 LA 494 (Terrill 2013) 19 firefighters were all tested where they had access to a vehicle on which narcotics were found missing. On that record, the City was dealing with multiple suspects and needed to conduct the test. One can reasonably imagine such a scenario arising in a law enforcement setting where drugs are found to be missing from an evidence room.

What constitutes reasonable suspicion will be based on each individual record and the arbitrator will have to make an independent determination of whether reasonable suspicion existed for the test. Obviously if the test turns out to be positive, that can be a factor in determining whether the test itself was based on reasonable suspicion, especially in cases where there is some evidence of impairment or unusual behavior by the employee.

RANDOM TESTING

Random testing is somewhat different and involves random testing of employees as a deterrent to any drug use and to send a clear message to employees that drug use is strictly prohibited. Even Elkouri notes that “not surprisingly, random testing is the most controversial of all methods of testing employees for drugs. Courts have upheld random drug testing by public employers only where the employee is in a safety sensitive position or public integrity sensitive job. See, National Treasury Employees Union v. Von Raab, supra, where the Court permitted drug testing for state employees that required direct involvement with drug interdiction and carrying weapons. See also, Skinner v Railway Labor Executive’s Ass’n, 489 U.S. 602, 130 LRRM 2857 (1989) upholding suspicionless testing of train crew members involved in accidents. Some might say that where there is an actual mishap that comes close to a reasonable suspicion test but on that record, it was considered random. See, Elkouri 8th Ed at page 16-9.

It is clear that there must be a showing of a “special need” justifying the test on a random basis. See, generally Elkouri 8th Ed. at Section 16.2.A.ii and fn 49 and the cases and authorities cited therein. Many federal Circuit courts have grappled with the question of whether a random test violates the 4th Amendment’s prohibition against unlawful search and seizure.
The Courts have held generally that unless the public employer can demonstrate a compelling need, random testing may well constitute an unlawful search and seizure in violation of the 4th Amendment.

Some states, cited by Elkouri, have dealt with this issue for public employees. Elkouri notes that random testing of civil service public employees has been upheld in Kentucky and Michigan, see Elkouri 8th Ed at page 16.10. In Arizona however, random testing was found to violate the 4th Amendment rights of firefighters. See, Petersen v City of Mesa, 83 P.3d 35 (Ariz. 2004). See also, Wenzel v Bankhead, 351 F.Supp. 1316 (N.D. Fla. 2004), where the Court also found the testing of a juvenile justice employee who worked in an administrative office to be unconstitutional. The employee was not in any sort of safety sensitive position; and Lanier v City of Woodburn, OR, U.S. District Court LEXIS 29463 (OR 2005), where the Court struck down pre-employment drug testing for a library page whose job was mostly administrative but involved some contact with children.

Each state may be somewhat different but for safety sensitive positions, it is likely that an arbitrator will uphold the testing. It may also depend to some degree on what that particular state’s law is with regard to marijuana. Is it legal for recreational use? For medical use only? It is too early to tell if those state laws may impact arbitral decisions but as the public’s attitudes toward marijuana change, it is possible that it might have some impact.

For private sector cases, arbitrators may not be as concerned about whether a unilaterally adopted random testing policy is a violation of the 4th Amendment or is an unfair labor practice but rather whether it is reasonable under the circumstances. Some arbitrators have refused to uphold discharges of employees who test positive pursuant to a unilaterally adopted random policy unless the employer can establish a compelling reason for the discharge. See e.g., Armstrong Air Conditioning, 99 LA 533 (Harlan). Others balance the need for a drug free workplace against the privacy interests of the employee and the need to prove just cause for the discharge. See generally Elkouri, 8th Ed. At Section 16.2.A.ii, page 16-11 to 13. See also, Casias v Wal Mart, 695 F.3d 428 (6th Cir. 2012) discussed below.

The result will depend on the facts and circumstances of each case. If there is evidence that the employee is in a safety sensitive position, such as a refinery or other workplace that involves the use of dangerous chemicals or equipment, there is a greater likelihood that the testing will be upheld. That though depends on the facts.

**WHAT IS “IMPAIRED” FOR MARIJUANA USE?**

As noted above, when there is observable evidence of “impairment” the test may be required under a reasonable suspicion analysis. The remaining question is what constitutes sufficient presence of Marijuana in an individual’s system to warrant a finding that the person is “impaired” and that discipline should be imposed. The answer is that it is not completely clear.

With alcohol, there is a commonality regarding what makes a person appear to be intoxicated, glassy eyes, slurred speech, loss of motor coordination as well as other factors are all things that make a person appear to be drunk. The use of illegal drugs is more difficult to detect. Further, observation of drug usage may not be as obvious as in alcohol cases.

While it is generally widely accepted that a level of .08% BAC is sufficient to warrant a DUI charge in most states (although that level has dropped in recent years from what had been considered the legal limit” of .10%) there appears to be no well-defined standard for determining the level of THC in a person’s system to constitute true “impairment.”
Several states have however established per se levels of THC to constitute impaired driving. See, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf. Consult your state’s law as to whether something is considered a criminal offense might well be a factor to consider in an arbitration over discipline in such a case.

The operative chemical in marijuana is called “tetrahydrocannabinol,” usually referred to as THC. It can be measured to determine its presence in the body, just like alcohol can. Here however lies one of the issues: THC is not the same as alcohol. It reacts differently in the body; it metabolizes differently and its impairing impact is different. Unlike the 0.08 blood-alcohol level that’s widely accepted as indicative of drunken driving, establishing a credible level for THC has been elusive.

In the study cited above the NHTSA outlines the chemical differences in the way in which alcohol is absorbed and eliminated from the body versus how THC reacts. It is a different process. Alcohol is water soluble while THC is fat soluble and this stays in the human system for longer periods. As the NHTSA observed, “THC can be detected for up to 30 days post ingestion. (Citation omitted). While THC can be detected in the blood long after ingestion, the acute psychoactive effects of marijuana ingestion last for mere hours, not weeks or months.” See, NHTSA paper, supra, at page 4 and citations to peer reviewed studies listed therein.

Certainly, an employer may decide by policy that a certain level is the threshold but that may run into the requirement to show just cause for discipline. Some of this difficulty is based on the nature of the drug itself, and how long it stays in the system and how long it results in a reduction of reflexes, judgment or other motor functions to constitute “impaired.” It may also depend on the nature of the person’s employment and whether the employee is in a safety sensitive position or not.

The scope of this paper is not intended to be a complete analysis of the medical and chemical research done on this subject. Suffice it to say that there is not general agreement on the impairing effects of marijuana on things like driving. Neither is there an apparent general consensus on the amount of THC or how long it has been in the system to result in “impairment.”

There are studies that quite literally go all over the place in attempting to determine the appropriate level for a person to be considered impaired. The scope of this discussion will not attempt to divine what that level is or the science behind those various studies.

Testing for the presence of drugs requires a certain scientific process be used and that chain of custody be maintained of the sample. Employers must be able to establish the testing procedures complied with federal standards and that there was no break in the chain of custody. For example, where it was shown that the technician failed to split the original specimen into two samples at the time of collection and took a portion of the sample and shipped it to the confirmation lab, the arbitrator ruled that the failure to split the specimen in accordance with Department of Transportation regulations rendered the test invalid.

They may also need to establish that whatever the employer considers a “positive test” and one that is over a prescribed limit is recognized as “impairing.” That too will depend entirely on the facts.

As noted above, we will not discuss in any detail the testing procedures other than to state that the employer should be prepared to establish, and the union should be prepared to defend against, the findings of the testing, how the test was done and the chain of custody issues, if any.

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18 Delaware Co., 104 LA 845 (Gorman 1993). Discussing the issue of chain of custody.
19 Mail Contractors of America, American Postal Workers Union, 122 LA 1488 (Hoffman, 2006).
In Arbitrator George Roumell’s excellent discussion of the topic of drug testing, he provides the following information:

“There are two drug tests – the Enzyme Multiplied Immunoassay Technique (“EMIT”) test and the gas chromatography (GC/MS) test. The EMIT test is a screening test that is simple and inexpensive. The employer and/or laboratory set a threshold by which the sample is either deemed “positive” or “negative” for the presence of drugs. The EMIT system is highly sensitive in detecting relatively small amounts of drugs, it cannot specify which drugs. Because of this, it is generally accepted in the arbitrator community that a positive EMIT result is not grounds for discipline or discharge by itself. Therefore, major laboratories have also adopted this view, and will only issue a report that drugs are present if it has been detected by a screening test and a confirmatory test.

The U.S. Supreme Court has also favorably referred to this two-step procedure in Skinner v Railway Labor Executives’ Association, 489 US 602, 109 S.Ct. 1402 (1989). And where an employee is given two tests, and one shows positive and the other negative, arbitrators will not uphold termination. The GC/MS technique, i.e. gas chromatography in conjunction with mass spectrometry, is the confirmatory test that is “considered to be one of the most accurate analytic methods for identifying drugs in body fluids.” Each drug has a molecular fingerprint that can be identified by comparison with the laboratory’s library of standard patterns.

The general procedure for an employee’s drug test begins when the employee is sent to the testing facility. There are standards that a testing facility must maintain in order to provide the proper balance between the employee’s due process and privacy rights and to ensure the integrity of the sample. The employee is provided a drug screen kit to collect a sample of his or her urine in the privacy of a bathroom. When the employee returns with the sample, the technician will begin the procedure to prepare the sample for testing, in the presence of the employee. The sample must be at least 45 mL of urine. There is a temperature gauge on the sample container that records whether the sample is within 90 to 100 degrees Fahrenheit range required. The technician must then examine for signs of tampering. All of this must be done in the employee’s presence, who must then sign off on the certification statement.

When procedures are not set forth or are ambiguously stated in an employee handbook, contract, collective bargaining agreement, federal regulation, or any other type of binding writing, the procedure and test must be “reasonably reliable to decide [the grievant’s] employment fate.”

One of the other issues is the requirement of proof that a certain level of THC in one’s system equates with impairment. Usually the cutoff – however that is defined – is expressed in terms of nanograms per milliliter, ng/mL. Some studies that indicate that 50 ng/mL is a positive test. That may not be universally agreed upon however and it may well be crucial to establish by medical testimony or other evidence that the cutoff proves actual impairment. There is also considerable debate about how long THC remains in the system and how long it remains an impairing substance.

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20 Excerpted from Drug and Alcohol testing by George Roumell, 2006, submitted to the Labor Arbitration Institute. Many thanks to Mr. Darrell Steinberg of the Aramark Co., for sharing his insights and a few of the cited cases herein as well.


24 49 CFR Part 40.65(a).

25 49 CFR Part 40.65(b) (1).

26 49 CFR Part 40.65(c).

27 Board of School Commissioners of Mobile County, 121 LA 1524 (Hoffman, 2005).


29 https://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf. This is but one of many studies found on the Internet discussing this subject. As noted, in an individual case, it might be crucial to provide medical testimony or other evidence to establish that the level found constituted an impairment and that the cutoff established by the employer was reasonable under the circumstances. See, also, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf. There is also research to support the claim, still under some debate,
As noted, THC operates differently from alcohol and other drugs and there are studies that show that one can have THC in the bloodstream even though any impairing effects of it have long worn off and the person is fully capable of performing most tasks. It is also apparent that detection times vary depending on a number of factors such as a person’s body type, i.e. fat content, and the amount of chronic use of cannabis to name a few.30

The main questions are thus: what is the “defined cut off” for the level of THC that the employer says constitutes a positive test and therefore grounds for discipline or discharge? Second, even if the person is above that defined cut off level of ng/mL, does that necessarily mean that a person is impaired and unable or unfit to perform their tasks? That appears to be based on the facts of each case, the level of THC found, and the type of job at issue, i.e. is it safety sensitive or not?

Parties should be prepared to justify the cut off level and to explain in lay terms why that level is important to an arbitrator. There should also be a discussion of how and why the position is or is not a safety sensitive position.

This will of course depend on each set of facts and while some positions may be “obviously” safety sensitive, others may not.

**ZERO-TOLERANCE POLICIES**

Many employers have adopted so-called zero tolerance policies that state that any employee who tests positive for the presence of THC will be terminated. Simply stated, Elkouri, and many arbitrators find these policies to be problematic at best, not only because they run squarely into the issue of a showing of need by the employer but also because they run contrary to the very notion of just cause. Each case must thus depend on its own set of facts and what the actual policy is.

Elkouri notes as follows: “arbitrators generally do not allow zero-tolerance policies to overcome just cause requirements.” Elkouri 8th Ed at Section 16.2.A.iii, page 16-15. However, if the facts warrant discharge due to the nature of the employment, an arbitrator’s determination to uphold a discharge due to a positive drug test will be enforced. See, CITCO Asphalt Refinery v Local 2-991, 385 F.3d 809, 175 LRRM 3057 (3rd Cir. 2004).

Elkouri also notes that “an employer may not institute a “zero-tolerance” policy in contravention of a collective bargaining agreement that views drug or alcohol addiction as an illness and provides for subject employees to enroll in rehabilitation and treatment programs. See, Gov’t Employees v FLRA, 470 F.3d 376 180 LRRM 3282 (D.C. Cir. 2006).

**WHAT ABOUT OFF DUTY CONDUCT IN USING OR SELLING ILLEGAL DRUGS?**


   The arbitrator summarized the need to establish a nexus between off duty conduct and the job. As noted above, just cause is still required and simply because the employee is found to be using marijuana off duty, does not establish the nexus. The employer needs to show more than that they don’t like the use of marijuana. In this case the employee sold illegal drugs to a co-worker off duty during a lunch break.

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30 http://norml.org/news/2006/02/23/marijuana-detection-time-shorter-than-previousy-assumed. This study showed that as of 2006, the detection times were different from what had been previously assumed.
Not every act of employee misconduct warrants discipline. For many reasons, ranging from the absence of due process to disparate treatment to overreaching or inappropriate punishment, an arbitrator may vacate a disciplinary discharge. Even where off-duty and off-premises misconduct has been proven, just cause will not lie unless a connection or nexus between the misconduct and the discharged employee's job has been established. As professors Elkouri and Elkouri note:

It is well established in arbitration that activity that is engaged in by any employee off the job and off the employer's property is not properly subject to regulation by the employer unless some reasonable connection or “nexus” exists between the activity and the employment. Many arbitrators have recognized the applicability of this rule to drug and drug-related activity.”

The arbitrator found the necessary nexus to the work since the co-worker immediately returned to work. The arbitrator ruled that “in the capacity of a drug dealer, the employee is a very real and corrupting danger to the Employer and other employees. A distinction needs to be drawn between the user and seller of illicit drugs. … The dealer who pursues his illicit dealings among his fellow employees is a corrupting influence in the workplace. There is a clear nexus to the interests of the Employer when a drug dealer is working among its employees.”

The discharge was upheld.

DOES A POSITIVE TEST ALWAYS = JUST CAUSE? ALSO, DOES HAVING A MEDICAL CARD ALWAYS EXONERATE THE EMPLOYEE? SOME ARBITRAL RESPONSES

Arbitrator Roumell in his article referenced above, notes that a positive test, i.e. one that is over some pre-determined limit, such as 50 Ng/ml, does not always mean that a person is “impaired,” nor does it always mean that just cause exists for discipline/discharge. He cites Orange County FL, International Association of Firefighters, 123 LA 1464 (Smith, 2007) where there were mitigating circumstances presented that the medical review officer who conducted the test failed to report to upper management.

Further, as discussed above, many arbitrators have ruled that “being under the influence” of drugs or alcohol in the workplace is in itself ambiguous. While a test may conclude there is alcohol or drugs in an employee’s system, it only creates a presumption that the employee was under the influence. In one case, Arbitrator Kahn explains that the presumption is rebuttable and further notes the need for specifics due to an individual’s unique tolerance for alcohol. Noting the police sobriety tests can provide actual evidence of how a person acts, Arbitrator Kahn required “concrete evidence to establish that [the employee] was indeed ‘under the influence’ when he reported for work.”

While his decision dealt with alcohol, it appears that his analysis could easily apply to marijuana as well. Thus, while a person might well test at or above 50 ng/mL, that creates the presumption but may not completely carry the day absent any evidence of conduct that would support the conclusion that the employee was indeed “impaired.”

Some arbitrators have noted that the current trend in company policies is to offer an Employee Assistance Program, EAP, or rehabilitation on the first offense. See also, The Troubled Employee, infra.

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32 See also, Indiana Bell Telephone, 93 LA 981, 988 (Goldstein 1989) for a similar result and analysis. Cf, Elkouri, Resolving Drug Issues, at 220-21, for a discussion of other rulings where drug activity is not considered a per se ipso facto detriment to the workplace.
33 76 LA 1005 (Kahn, 1980).
34 Id.
35 Id.
36 U.S. Steel Corp., Granite City Works, Local 1899, 124 LA 978 (Das, 2007).
In many cases, the parties’ contract acknowledges that drug and alcohol use may derive from a disease and that the disease may be properly treated through rehabilitation, including a program offered by the employer. In fact, the mere existence of a generally corrective discipline policy may find that discharge for a first offense of being under the influence at work may be “unduly harsh.”

Keep in mind that the standard for discipline remains whether there is “just cause” for the discipline and that traditional concepts still apply. Thus, even though there are differing state laws regarding the use of marijuana, those laws are not the basis for the analysis. Like alcohol, the mere fact that a substance is legal, even for recreational use, does not excuse use of it on the job or coming to work intoxicated. The question in some cases boils down to what the employer’s policy is and the underlying facts regarding impairment.

As the cases cited indicate, sometimes having a card from a licensed professional is strong evidence that the employee should not be fired. That does not always end the story however. Use or possession on duty is still a serious, probably terminable offense whether it is legal in the state or not, as the cases cited below show. A survey of cases involving employees who hold a marijuana card do not always exonerate employees who test positive for marijuana. Some of these cases are “old” in the sense that they pre-date the current national change toward marijuana but they can still be instructive.

1. (Unnamed Employer) and The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 2012 BNA LA Supp. 149225 (Brodsky 2012).

An employee was tested because he was acting erratically. The employee was tested for this behavior and his test had the wrong temperature, which implied that his test was fraudulent. The employee took another test that was positive for marijuana. He had a marijuana card but it was not valid for the time frame when the test was administered and the incident occurred. It thus appeared that he got it later in order to bolster his claim of reinstatement. In fact, he admitted that he had initially submitted a falsified card to the Human Resources people at the time of his discharge.

The arbitrator found significant that the employee was reported to be acting erratically by a co-worker and that it was suspicious that the first test was the wrong temperature. This was simple analysis for the Arbitrator. The fact that the employee was acting erratically at work and then the tainted testing led to his discharge. The marijuana card had no effect mitigating the fraudulent test.

First, even if the grievant has permission to legally purchase/possess marijuana, it does not mean he has permission to report for work under its influence. Alcohol is a legal substance, but it does not mean an employee can come to work drunk. The relevant Company Drug and Alcohol Policy and the statement in the Employee Handbook govern how employees who are under reasonable suspicion of being under the influence of drugs or alcohol are treated.

Second, in the instant case, the grievant admitted that he presented a falsified medical marijuana card to Human Resources after his discharge in an attempt to save his job. While this was post-discharge conduct and there is no evidence that the Employer raised this fact in the grievance procedure, the grievant’s admission of falsification after his discharge might have bearing with regard to a remedy for the grievant, since he has now admitted to an untrustworthy act.

The discharge was upheld on the basis that he failed the drug test and then lied about various things later, including submitting a false card and tainting the original urine test.

37 Id.
38 See, e.g., Domtar Industries and United Steelworkers Local 13-1327, 124 LA 902 (Shieber, 2007).
2.  *United Electrical, Radio and Machine (UE), and (Unnamed Employer), 2016 BNA LA Supp. 200631 (Dunn 2016).*

The employee had a marijuana card for pain in his knee and had tried other opioid medications without success. The employer’s rule was that if a person is on any sort of medication like that, they are to report it to their supervisor, even if they have a legal prescription for it. He had not complied with that rule and did not advise his employer of the card before being tested.

An employee was tested positive for an accident at work and it was only then that he told HR that he had a medical marijuana card at testing. There were two issues. First, he did not tell HR about the card before having a test and second, he did not buy marijuana from a licensed dispensary.

The arbitrator ruled for the employer and sustained the discipline because the marijuana was not purchased from a licensed dispensary. Because of this, there was no compliance with the card, which required that the marijuana be purchased from a licensed and approved location, and because there could well be problems with the purity of the marijuana itself. It would have been a more difficult case if the dispensary was not an issue and the case was only that the employee had not told HR about the marijuana card.

The arbitrator discussed the risks in buying marijuana “off the street.” It could possibly be tainted with other drugs and may not be of the requisite purity and strength that medical marijuana would be subjected to at a licensed dispensary.

The issue of the employee telling the employer about the marijuana card is something of a conundrum for the employee. If an employee tells HR that they have a marijuana card then they might be tested. If they don’t, then the employee is wrong for not disclosing the use of a marijuana card.

The arbitrator stated as follows: “The fundamental problem … is [not] that the grievant … tested positive for marijuana, … because he had lawfully purchased and consumed medical marijuana pursuant to his doctor’s prescription, but rather because he was smoking marijuana recreationally with and as provided by his friends, or smoking marijuana which he had purchased illegally 'on the street’…” Slip op at page 5.

By smoking marijuana obtained illegally off the street, rather than at a licensed dispensary, the grievant did not possess any reliable information that the marijuana he was smoking was free of adulterants. Marijuana purchased off the street can be laced with a number of chemicals to enhance its high - or worse, adulterants which could generate an addiction to the unknown chemicals added to the weed. Indeed, that is one of the arguments for legalizing the sale of marijuana through licensed and regulated dispensaries, to eliminate the risk of black-market marijuana laced with more addictive substances or other contaminants.”

The arbitrator ruled that the company had cause to remove him for work and not allow him to return until he tested clean for drugs and alcohol.

3.  *Wellington Industries and UAW Local 174, 136 BNA LA 1024, (McDonald 2016)*

The employee damaged equipment at work. The employer allowed drug testing when there is possession of drugs or the employee’s admitted use of drugs, when an employee appears unable to complete his or her job, or an employee is injured or damaged company equipment.

If damage to equipment is deemed to be caused by a machine failure, the employee may not be sent for the employee drug testing. However, if damage to the equipment was the result of the employee’s carelessness or inattentiveness or negligence, or failure to follow plant rules, drug testing is then warranted. This of course is a fact question that may ultimately have to be decided by an arbitrator in the face of a challenge to the validity of requiring the test itself.
The arbitrator ruled that the employer complied with its policy regarding the reasonableness of the test since there was damage to a piece of equipment. There was also evidence that it was due to the carelessness and inattentiveness of the employee. The next question was whether that was caused by the marijuana. The arbitrator found that the level of marijuana in the employee’s system was “high,” 300 Ng/ml. His testimony that he felt “OK” was self-serving and too subjective to be credible.

The employer argued that it has been consistently held that a medical marijuana card is not a defense to a positive drug test and that having a medical card, even for valid medical reasons (the employee had been diagnosed with cancer and used marijuana to relieve some of the symptoms of the disease and side effects of the drugs), did not negate the employer’s drug free workplace policy.39

From the testimony received from a number of witnesses, it appears that the grievant was well aware that he was in some difficulty. He told some employees he “f*cked up,” “made a mistake,” and that “it slipped my mind that the tool was not removed before recycling the press.” Further, on Monday morning when the employee and members of management discussed the subject of testing, the employee admitted that if he were tested, he would “test dirty.”

The arbitrator concluded that there is no need to debate whether the Company had discretion to send employees for drug testing or whether the “observed behavior” in the employer’s policy is to be followed. The “observed behavior” language had been in place in the Collective Bargaining Agreement since 2005 and has remained a standard through three negotiated Collective Bargaining Agreements. Certainly, based upon the “observed behavior” of what occurred.

It was also significant that the arbitrator found that the employee held a safety-sensitive position, and that there were clearly sufficient facts that had been observed to justify sending the grievant for a drug screening.”

The discharge was upheld.

4. Teamsters and (Unnamed Employer), 2012 BNA LA Supp. 148941 (Lille 2012)

The grievant worked as a custodian in a School District for approximately 14 years. On April 1, 2011, the grievant did not arrive in the kitchen as assigned. The manager began to search the school for the grievant and found him in a closet. His eyes were red and the co-worker reported that the employee’s clothes and the custodial closet smelled of marijuana.

The grievant admitted to being a marijuana user and he used marijuana for pain related to a work-related shoulder injury. He was eligible for a medical marijuana card but did not get it until after he was discharged.

The arbitrator ruled: “However, the fact remains that the grievant used marijuana. The carboxyl metabolite proves he did so at some point in the weeks prior to his discharge. Moreover, the grievant himself admitted at the time of the test and again at the arbitration hearing that he used marijuana. He also testified he was a routine user and characterized himself as a "closet smoker." The fact that he regularly used marijuana is not in dispute.”

39 The arbitrator cited Casias v Wal-Mart, 764 F. Supp 2d 914 (Western Dist. Michigan 2011, aff’d, 695 F. 3d. 428 (6th Cir 2012) where the Court held that a medical marijuana card is not a defense to disciplinary action taken by an employer for failure of a drug test. In Casias, the court distinguished private employment and that of state action. The court observed that the purpose of Michigan’s Medical Marijuana Act was to protect medical marijuana users from state action which, “only confirms that it was not meant to regulate private employment.” It is important to note that Casias did not involve a labor arbitration and was used to support the decision that the Michigan law did not apply to private sector employers.
Further, the supervisor testified that on the day of the test the grievant was acting "spacey" and had red eyes and that his speech and behavior were not normal. She also testified she smelled marijuana when she spoke with the grievant, and that she was familiar with the smell of marijuana. Her testimony is given significant credibility because, as the grievant himself testified, he could think of no reason why she would lie. She had nothing against the grievant and in fact, they got along well.

Moreover, the principal and assistant principal also spoke with the grievant and in fact, drove him to the medical center, and the principal drove the grievant home while the assistant principal drove the grievant's car. Both believed the grievant to be under the influence of marijuana, noting his speech and mannerisms and appearance. This testimony was also credited as credible and persuasive.

Finally, the grievant himself testified that he used marijuana and that he obtained it illegally through a friend. This too was found to be significant, see above, for the discussion regarding whether the marijuana was purchased legally through a licensed dispensary. The employee stated he did not obtain a medical marijuana card either before or after his discharge, and the physician's statement was not obtained until approximately one month after his discharge.” This undermined any possible defense to the use of marijuana and appeared to be a post hoc attempt at justifying the conduct for which the employee was fired.

The general trend here appears to be that the employee must show that there is a valid medical card and that a licensed medical professional has supported the use. Remember that marijuana cannot be “prescribed” but it can be recommended and used under the supervision of a medical professional.

Second, the marijuana must be purchased from a licensed dispensary, not “off the street” to ensure that it is appropriate for the recommended use. See, United Electrical, Radio and Machine (UE), and (Unnamed Employer), 2016 BNA LA Supp. 200631 (Dunn 2016), supra.

Lastly, the mere fact of a valid card may not always provide a valid defense against a positive test. Some states specifically provide for that and employer policies, especially in the private sector, may well be enough to warrant discipline for a positive test. As noted throughout this discussion though there must be adequate just cause to support any discipline even where there is a positive test.

A FEW CASES WHERE HAVING THE CARD MAY WELL HAVE BEEN A SIGNIFICANT FACTOR IN OVERTURNING DISCIPLINE BASED ON A POSITIVE TEST

There are other cases where having a medical card for marijuana was found to be a valid defense. These cases too though, as always, depend on their own unique facts.

AFSCME #75 and Lane County Oregon, 136 LA 585 (Jacobs 2016) the employer, who was in a state where use of marijuana was legal, had a drug free policy that at one point said that nothing in the state’s new marijuana law required an employer to accommodate the medical use of marijuana in the workplace. Seemed simple enough, but the policy went beyond that.

In the very next paragraph though, the policy said “Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or [the employer’s] operations.”^40

The employee was suspected of using marijuana since supervisors smelled it on his clothes. He tested positive for THC and admitted that he was taking medically recommended marijuana to counteract the effects of chemotherapy. He had prostate cancer and the drugs caused serious side effects that the marijuana helped to alleviate.

^40 Marijuana cannot be formally “prescribed” by physicians and can only be recommended, since it remains illegal under federal law.
The policy itself provided the grounds to reinstate him since there was no evidence whatsoever of impairment of any kind and he was not in a safety sensitive position. It should be noted that if the employee had been in a safety sensitive position the result might have been different.

**Unpublished decision in the federal sector**: In an unpublished case, that demonstrates some of the issues that can arise now with marijuana use – especially for medical reasons, an employee was under the care of a licensed physician who recommended marijuana for a medical condition. The employee self-reported the use to his supervisor who then had him tested. The test showed the presence of THC that was consistent with the medical use as the EE had reported. The employee was not in a safety sensitive position and there was no evidence of use or possession while on duty.

The employer fired him for being under the influence at work. The policy was again inconsistent with that and allowed the employee to remain at work if he was using the marijuana per an MD’s recommendation and there was no evidence of possession or use on duty and where the employee was not a safety risk. All of those factors applied in the employee’s favor.

Significantly, the terms of the employer’s policy in that case said “where there is evidence of a medical reason for the use of a drug, the test counts as a negative test.” Under a just cause analysis, I ruled that the policy must thus be applied as it is written and that the test in this instance had to “be counted as a negative test.” Under those facts, the discharge was overturned.

**In another unpublished case**, the employee was found to have a pipe that allegedly contained marijuana residue in it while at work. The employee was in a federal prison facility delivering items there when a drug sniffing dog “hit” on him. After a search, the pipe was found in his pocket. There was however no evidence of impairment at that time.

He was tested and THC was found in his system, whereupon he acknowledged that he had smoked marijuana a few days before – in a state where it was legal to do so recreationally. The employee was reinstated since there was a lack of evidence that he was actually impaired as of the time he was at work and no “hard” evidence that he used the pipe to smoke marijuana while on duty. (Had there been the result might again have been very different).

Further, the employer was unable to find the pipe again for testing and there was no hard evidence that it actually contained marijuana, even though the officers thought that’s what it contained – although they did not testify at the hearing.

Based on this paucity of evidence, the result seemed clear enough and the employee was reinstated under a traditional just cause analysis and the lack of evidence by the employer.

**There are several other cases involving use of marijuana.**

In *Monterey County and SEIU #817*, 123 LA 677, 681 (Staudohar 2007), the arbitrator set aside a discharge where the employee who had been on leave for some time and returned to work, who had a medical marijuana card, was discharged because some marijuana was found in his desk. Though the central point of the analysis was the fact that it was not clear who was responsible for placing the marijuana in the desk, the arbitrator stated that the medical marijuana card “provided a ‘viable defense’ for medical usage” and that the employee would not likely have been convicted of any crime.

In a subsequent case in *County of Solana and SEIU #1021*, 128 LA 1702 (Staudohar 2011), the arbitrator concluded that the use of marijuana had no effect on the employer’s business and relied on the longevity of the employee and lack of previous discipline plus an attempt at rehabilitation as the basis for setting aside the discharge.

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41 While the following two cases cannot be cited formally, they provide guidance as to the type of evidence and arguments each side have, or to defend against in a marijuana case.
The use was off-duty and there was no evidence of impairment or “acting erratically” as in other cases and thus no evidence of on duty use or actual impairment while on duty.

The employee was reinstated without back pay, for reasons other than the off duty use of marijuana. (The employee was less than truthful during the investigation and that was found to be a significant issue in the arbitrator’s decision). The employee was also required to show drug rehabilitation and clean test upon return.

In Oregon, which has a Medical Marijuana Act, the arbitrator in City of Portland and Laborers #483, 123 LA 1444 (Gaba 2007), recognized that Oregon had a “very lenient approach to marijuana”, set aside the discharge of an employee who tested positive for marijuana. The marijuana was found in the employee’s car and the arbitrator found that it had been left there inadvertently.

The arbitrator stated that the employer’s policy was “silly” in that the rule was overbroad and would have literally prevented an employee from bringing home a 6-pack of beer. See also, AFSCME and Lane County, Oregon, 136 LA 585 (Jacobs 2016) cited above.

Montgomery County, County of Solana and City of Portland all involved non-federal public employers. However, the decisions of the State Supreme Courts for the proposition that the respective state medical marijuana statutes do not apply to employers might well also exempt state, county and city public employers.

There are several basic principles in dealing with issues where the employee tests positive for marijuana and has a medical marijuana card or certificate issued by the state involved. For example, if the policy states that an employee will be terminated for testing positive unless there is a legal justification then the issue becomes one of notice.

In Freightliner and Teamsters Local 305, 336 F.Supp.2d 1118, (D. Crt. OR 2004) the Court overturned an arbitrator’s decision, also from Oregon, that had reinstated an employee who had tested positive for marijuana. See also, Paperworkers v Misco, infra. It is important that the decision draw its essence from the labor agreement.

The Court held that the arbitrator ignored clear language in the collective bargaining agreement and had exceeded his authority. The arbitrator ruled too that the employee could not be deemed to be under the influence because he had obtained a prescription under the Oregon Medical Marijuana Act and that his ruling did not draw its essence from the labor agreement.

Significantly, the drug policy was expressly incorporated into the parties’ collective bargaining agreement. Thus, the parties had agreed, as a matter of contract, that being under the influence was a disciplinable matter and effectively agreed that the cutoff point prescribed by the employer meant “under the influence.”

In stark contrast to the agreed upon language in the CBA, the arbitrator found that it was not. Further, there was also no stated exception to that general rule as there was in the Lane County case, supra.

The rule as provided in the parties’ labor agreement in Freightliner was as follows:

Reporting for duty or working under the influence of any drug or alcohol (whether or not legally intoxicated) is specifically prohibited and will be cause for suspension without pay or discharge, depending on the circumstances. See, 336 F.Supp. 2d at 1121.42

42 The CBA also defined the level of ng/ml that constituted “under the influence;” a factor not found in many CBA’s.
The arbitrator did not base the analysis on whether the degree of discipline was reasonable but instead ignored that clear language. The import of these decisions is thus to be aware of what the policy actually is.

Further, *Zurn Industries LLC*, 132 LA 734 (Orlando 2013), the arbitrator set aside a discharge of an employee who, following an accident, was tested for drugs and tested positive for marijuana on the grounds that there was no proof that the employee was impaired. In *Zurn*, the policy provided in part that the “workplace be free from influence of illegal drugs or being under the influence of illegal drugs and the use that adversely affects the employee’s work performance.” Though the policy provided that “employees in sensitive positions found to have violated this policy shall be terminated immediately,” Arbitrator Orlando stated that the lack of proof that the employee was impaired indicated there was no violation of the policy.

When there is notice of testing of a post-accident drug test and the policy calling for discharge which has been followed if the employee fails the test then the employer has sustained discharges. Of course, the issue is whether the policy is unilaterally adopted or has been negotiated.

In *Temple Inland, Inc.*, 126 LA 856 (Wheeler 2009) in a probable cause test, a positive test was held to be grounds for termination because of the clear provisions of the collective bargaining agreement so providing.

Whether the policy is negotiated or unilaterally implemented, whether the language for termination is mandatory or is based on language “may be subject to termination,” is determinative as to the leeway an arbitrator may have in reviewing the matter. Likewise, the failure to follow contractual procedures in regard to drug testing can be the basis for setting aside discipline.

*King Soopers, Inc. and IUOE # 1*, 131 LA 459 (Sass 2012). The arbitrator reinstated the Employee where there was a hair test that showed the presence of marijuana in the employee’s system. The arbitrator found that generally the employer used a urine test but used hair here. That showed only that the employee had used marijuana in the past but said nothing about recent use.

The arbitrator found that off duty use, without any showing of impairment on the job was not much different than off duty alcohol use that did not affect the employees work performance. He found too that the hair test did not show with any degree of reasonable probability that the employee had illegal drugs in his system at the time of the accident which led to the test in the first place. Finally, the mere fact that marijuana is still illegal under federal law was of little significance.

*Dep’t of Justice, and AFGE #10*, 135 LA 185 (2015). The employee tested positive and fired for egregious misconduct. The arbitrator ruled that his misconduct was not as egregious as the employer claimed and reinstated the grievant subject to the 30-day suspension. The agency had also continued to employee the grievant for several months after the positive test. The arbitrator also found that the positive test did not impair the prison’s security or impar its operations. Id at 191.

He also ruled that the union had failed to raise the question of the validity of the test during the hearing and was prohibited from doing so later.

Moral of that story – raise any issues with respect to the test or the other issues regarding testing at the hearing in a timely fashion.

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43 *In re Biolab, Inc. (Adrian, MI)*, 114 LA 279 (Brodsky, 2000).

In concluding this section on medical marijuana statutes, it must be emphasized that the arbitrator’s duty is to interpret the contract, and generally not to pass judgment on state or federal law. The arbitrator has no jurisdiction to declare a state statute or voter-passed constitutional amendment to be invalid. Nevertheless, “for just cause” is the standard to be applied to say that the principles of just cause consistent with contract language and the applicable statutes should be considered in marijuana-related cases.

Public policy – In *Paperworkers v Misco*, 484 US 29 (1987) the US Supreme upheld an arbitrator’s decision where the employee had not violated a rule against possession of marijuana on the employer’s premises. The 5th Circuit overturned the arbitrator’s award on public policy grounds but that was reversed by the Supreme Court, holding that the award “drew its essence from the CBA.” Misco has frequently been cited for the proposition that an arbitral award may be overturned as violative of public policy but it is important to remember that it arose out of a marijuana related incident.

**Second hand smoke? Maybe, but conditions have to be extreme**

There is some science and precedent for the proposition that under the right conditions second hand smoke can cause a possible positive test. In a recent article published in the Journal of Drug and Alcohol Dependence, there is research potentially supporting the claim that under “extreme condition” in an unventilated area, second hand smoke can cause “positive effects in the first few hours in some cases high enough to test positive for workplace or commercial testing programs.

**Some efforts to rebut finding of a positive test - not always successful**

In *US Steel and USW 1014*, 133 LA 907 (Bethel 2014) there was a positive test and the union failed to produce any evidence to rebut the employer’s expert witness testimony that the testing cutoff was designed to account for the effects of passive inhalation.

The discharge was upheld where the employee was subject to a last chance agreement and had to remain drug free. He tested positive on a sample of underarm hair

There the employer alleged that he did not smoke pot but others around him did. The union failed to provide any rebuttal testimony to the employer’s evidence that the testing procedures took that into account. It is of course unclear if the result upholding the discharge would have been different if they had.

It is relatively clear though that the conditions do have to be “extreme,” i.e. a lot of exposure and in close proximity to the employee for an extended period of time.

It is important in these cases to consult an expert with the right credentials to prove/disprove the test results and demonstrate to an arbitrator what you are trying to prove or disprove.

See also, *US Steel and USW #4134*, 134 LA 1196 (Das 2014), where efforts at rebuttal were also unsuccessful. Hair sample was sent to Psychemedics, a renowned lab for drug testing and the arbitrator found no issues with the sample or chain of custody.

The evidence of a negative sample taken a month later from underarm hair was found not to be persuasive as to the results closer in time to the first sample.

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45 *Wilmington City School District*, 130 LA 1063, 1071 (Szuter, 2012).

46 https://www.drugandalcoholdependence.com/article/S0376-8716%2815%2900160-X/abstract Researchers found that under extreme conditions in an unventilated room exposure to second hand cannabis can produce detectable amounts of THC in blood and urine as well as minor increases in heart rate, mild sedative effects and impaired performance on certain tests requiring psychomotor ability and working memory.
What if marijuana is found mixed in with other drugs?

This may well happen since most drug testing facilities will test for a wide range of drugs and chemicals. The result in such cases may well depend on the chemistry and science of how marijuana reacts in conjunction with other drugs, such as alcohol, methamphetamines, cocaine or other drugs.

The science of this is beyond the scope of this discussion but advocates should be prepared to discuss how the combination of drugs is or is not “worse” than ingestion of marijuana alone. Moreover, was the marijuana ingested in conjunction with prescription drugs? Might that result in impairment if there is evidence of both drugs in the system? In some cases, marijuana may be the least of the problems and the other drugs may well be far more powerful and dangerous and impairing than marijuana alone.

See the discussion above about the need to purchase any legal marijuana from a licensed dispensary to avoid tainting. In the cases where that was an issue the arbitrators seemed to be very concerned about it.

CONCLUSION

At the end of the day, just cause still applies to any case involving marijuana use. There will be questions about the use of the test – was it random or for reasonable suspicion – and there will be fact questions regarding that issue.

As in any other drug case, there will be questions regarding the chain of custody, the testing process and the accuracy of the test. There will also be questions regarding the appropriate cutoff and whether even a “positive” test will still be considered impairment. Further, there will be questions about whether even a positive test will rise to the level of just cause for discharge.

Finally, as a possible defense to such a case, a union might well raise the question, discussed by Professor St. Antoine, regarding the troubled employee and whether rehabilitation and/or EAP might be a way to save the job of an employee who has tested positive for marijuana.

As always, the result depends on the facts.

OFF-DUTY CONDUCT – IF I LEAVE WORK AND SCREW UP WILL WORK LEAVE ME?

OVERVIEW AND INTRODUCTION TO TOPIC

Initially it should be noted that many times commentators, parties and arbitrators refer to “Off-Duty Misconduct” and then discuss the standards by which such conduct can provide the basis for employee discipline. The term is a bit of a misnomer in that we are not talking about “misconduct” exclusively, but rather “conduct,” since not all such matters involve misconduct, i.e. conduct that is illegal or immoral, but may include some vague legal conduct but which the employer finds detrimental to its operations or which forms some other basis for discipline. We will discuss both in this context as well as the standards for determining whether there is cause to uphold discipline.

GENERAL PRINCIPLE

The general principle is that employers may not discipline employees for conduct occurring away from the workplace. As Harry Shulman said more than 70 years ago:

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 relation. 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. See, Ford Motor Co. and UAW-CIO, # A-132 (Shulman 1944).
See generally, Elkouri and Elkouri, *How Arbitration Works*, 7th Ed, BNA books at Sections 15.3.A.i. See also, “The Common Law of the Workplace, St. Antoine, 2d Edition, BNA Books 2005, at page 181 Section 6.6 (Employers are not society’s chosen enforcers. They have no general authority to punish employees for illegal or offensive off-duty conduct that has no significant impact on the employer’s business.)

Only when there is a showing of an exception to this general rule is there basis for discipline. The corollary to the general rule is that there must be a strong connection, or nexus, between the off-duty conduct and the employer’s business or the employee’s job.

Without this connection/nexus, any discipline for off-duty/off hours conduct will likely not meet the just cause standard and not be upheld. See, *Coca Cola Bottling Co*, 101 LA 576 (Thornell 1993) (nexus between off-duty driving conduct and the job must be determined on a case by case basis; automatic discharge for driving offense held unreasonable where the driving offense there did not affect the employee’s ability to drive on duty). See also, *US Postal Service*, 89 LA 495 (Nolan 1987).

The rationale for this is of course to balance the employer’s interests in carrying on a successful business and maintaining its reputation in the community against the employee’s right to privacy without interference from the employer where that conduct has no impact on the employer’s business and the conduct did not occur on duty.

Different commentators and arbitrators have set forth differing standards for determining nexus. All agree though that the nexus must be real and clear and based on adequate actual evidence of some adverse impact on the employer’s business. It cannot be based on mere speculation or conjecture.

**TYPES OF CONDUCT MEETING THE NEXUS STANDARD**

As noted above, different commentators have set forth slightly different standards for establishing nexus but it is clear that each case rises and falls on its own unique set of facts. See generally, *W.E. Caldwell Co*, 28 LA 434 (Kesselman 1957), arbitrator described three exceptions to the general rule prohibiting employers from disciplining employee for off-duty conduct:

1. The conduct harms the employer’s business;
2. The conduct adversely affects the employee’s ability to do their job and
3. Other employees refuse to work with the employee due to the off-duty conduct.


1. Conduct that involves harm or threats to supervisors, co-workers or customers with a showing of actual or likely potential relationship to the employer’s business;
2. Conduct that seriously damages the employer’s public image,
3. Conduct that makes it difficult or impossible for supervisors, co-workers or customers with an actual or potential relationship with the business to deal with the employee.
4. Public attacks on the employer, supervisors or the employer’s product (this may well involve posts on social media now that we are in the electronic age).
What follows in this section are the various standards many arbitrators use to determine nexus and some examples of these that has been applied in certain cases. There will be some overlap in these standards but the general rules are relatively well established through the arbitral literature and commentary. I will provide some explanation of both sets of standards as there is considerable overlap irrespective of which of the above rules are used.

**DOES THE CBA HAVE A LIST OF OFF-DUTY CONDUCT THAT RESULTS IN DISCIPLINE?**

Some contracts have a list of off-duty conduct that will result in discipline. Obviously in those cases the arbitrator must be cognizant of those and determine if indeed the conduct falls into one of those categories. Once done though that generally eliminates the need for further proof of nexus. See e.g. *Kroger Co.*, 108 LA 229 (Frockt 1997).

The arbitrator may still have to determine the appropriate level of discipline even where there is adequate proof of the conduct and proof that the conduct in fact fits within one of the listed categories but the decision about whether there is nexus in these limited cases will have already been made by the parties themselves.

Some relevant questions include: What exactly does the contract say about off-duty conduct? Is there a specific list or is it a general statement that the employee cannot engage in conduct “that is contrary to the employer’s interests” or some such vague language? Is there a specific list of consequences for certain types of off-duty conduct/misconduct? Are there rules about this in an employee handbook or other document given to employees? Is that set of rules negotiated with the union or unilaterally implemented?

**CONDUCT THAT DIRECTLY HARM THE EMPLOYER’S BUSINESS.**

Arbitrators have upheld discipline where there was an adequate showing that the employee’s off-duty conduct either did or would result in economic loss to the employer’s direct interests. If the employer can show that the employee’s off-duty conduct will cause or has caused actual economic harm the discipline may well be upheld but the evidence of this must establish more than a speculative loss or conjecture but rather show actual harm or a very real potential harm.

Cases involving an actual showing of economic harm are somewhat rare and the employer must be able to show direct evidence of such harm in order to have the best chance of prevailing in a case where this is alleged. Employers must also be prepared to show that the loss is significant as well.

For example, the loss of a single small customer who is angry at an employee for something the employee did outside of work, because of a neighbor to neighbor dispute or the like, will generally not be enough to warrant discipline. Also, as discussed below, employers should be prepared to demonstrate the extent of public knowledge of the conduct in order to provide an adequate showing of any economic loss claim.

Some factors may include:

What was the actual publicity? Be prepared to show that if you are the employer.

What was the actual harm to the employer’s business or reputation? This may be hard to show since business fluctuations can be related to many factors but if there is a loss of customers or evidence that people might stay away from the business due to the off-duty conduct; such evidence might well be very compelling.
CONDUCT THAT ADVERSELY AFFECTS THE ABILITY TO DO THE JOB

The next question posed by the commentators is whether the off-duty conduct will adversely impact the employee’s ability to perform their job. While a conviction for drug use alone may not be enough, the fact that the employee is in jail may be enough to warrant discharge because the employee is unavailable for work. Employers are not required to hold positions open indefinitely while an employee sits in jail. See e.g. Greater Cleveland Regional Transit Authority and ATU #268, FMCS Case # 10-57698-8 (Jacobs 2010) (employee thought he would be in jail “for a day or two” but when he was gone for more than a month the employer discharged him for being AWOL. Discharge upheld).

The other more obvious cases involve conduct that results in the loss of a required licensure the employee needs to perform his/her job, i.e. the loss of a driver’s license for a bus or truck driver. See School Board of Orange County, 108 LA 216 (Thornell 1997). Here the nexus is obvious and the question may be how long the employee will lose the license and whether the employer has a policy in place for reassignment to a temporary position in this case. Where the employer has no such policy arbitrators are more likely to uphold a discharge in such a case.

Here the evidence must establish that the license is in fact required to perform the job. Typically, this will be contained in the job description or other document. There should be evidence as to how long the loss of license will last and what steps the employee took to regain it or get some sort of temporary replacement for it that would allow the employee to continue to perform the job. What has the employer done in other cases that might give rise to disparate treatment allegations?

At times there will be mixed cases where the employer asserts a nexus on several fronts. For example, the bus or truck driver who loses a license due to off-duty drunk driving in violation of both a policy against such conduct and the requirement that they maintain their license.

What about a delivery driver who gets picked up for shoplifting or theft? On its face that might not pose a problem but if that driver is also expected to enter customers’ warehouses or stores to stock product and is left alone there, it very well might.

The employer might legitimately show that the delivery driver carries thousands of dollars’ worth of materials and that they cannot have someone who might be tempted to pilfer that. What security steps are in place to prevent it – e.g. bar coding that tracks packages so there is virtually no chance the box could be stolen, tampered with or opened without the employer knowing it? What were the circumstances of the off-duty theft? Was it a case of theft from a store or was it that an ex-wife alleged that the employee took something from the home he was not supposed to? These facts might make a difference in showing both the nexus as well as the potential harm to the employer.

The same could be said for a healthcare worker who goes to a patient’s home to deliver health care services and is there alone unsupervised.

As a general rule, if the employee needs some sort of license or qualification to perform their work and that is lost due to the off-duty conduct, this factor may well be met. As always, these cases will very much depend on the facts.

REFUSAL OF OTHER EMPLOYEES TO WORK WITH THE GRIEVANT

It will generally be difficult for the employer to rely solely upon allegations that coworkers do not want to or refuse to work with the grievant. Generally, there is some other behavior that causes this that will also provide a separate basis of discipline, i.e. the employee ignores safety rules, the employee is belligerent or threatens them, etc. Simply because the grievant is the town bully is not sufficient alone generally. The fact that the grievant may be gay or a member of a protected class is not sufficient to warrant discipline under a just cause standard absent other behavior that warrants it.
In one case the co-workers alleged that they did not want to work with the grievant and made bald assertions that they did not even want to talk to him because they were afraid he would sue them and based such general assertions on the belief that he had sued a car dealership in town for improper repairs to his car, among other things. These allegations turned out to be completely untrue and were based on false accusations, innuendo and in some cases just plain fabrication and small-town gossip. The grievant was reinstated with full back pay and benefits. See, IBT #160 and Dakota County, State of MN BMS file 09-PA-0945 (Jacobs 2009).

Likewise, simply because a coworker is gay and the employees have an irrational fear of HIV is generally not a reason to discipline the employee. See, Common Law of the Workplace, supra at page 183, citing AIDS in Labor Arbitration, Abrams and Nolan, 25 U.S.F. Law Rev. 67 (1990).

In HSSA and Dakota County, State of MN, BMS #13-PA-0248 (Jacobs 2014) a county probation officer was terminated for having a large marijuana grow operation on her property even though the employee claimed she was unaware of it. She blamed her husband. The story went viral over the media and the employee was identified as a county officer charged with making sure her clients did not engage in any illicit drug activity during probation. Even though there was no evidence that she engaged in the smoking or the growing, the arbitrator found that she likely knew about it or turned a blind eye to it. The publicity the case received was sufficient to sustain the discharge.

There was also evidence that the other employees would not work with her due not only to the nature of the charge and the clear need to remain drug free but also due to the publicity that went with this particular case. Other employees both in law enforcement positions as well as Court personnel testified that they were very uncomfortable assigning clients to her given the charges and the huge publicity this case garnered. On that basis as well, a sufficient nexus was found even though the conduct was off-duty and away from work premises.

In one case the employee’s well publicized affiliation with the KKK was found sufficient to warrant discharge. The bus company was faced with a boycott of its services. The arbitrator found that the grievant’s off-duty conduct so harmed the employer’s reputation and business that it warranted termination. See, Baltimore Transit Co., 47 LA 62 (Duff 1966).

PRACTICE TIP: In cases where one of the main allegations is that the other employees refuse to work with a grievant, the Union should be prepared to show that other employees do not have a problem working with the employee.

ASSAULTS OR THREATS TO CO-WORKERS OR OTHERS

These cases fall into two categories: 1. assaults, harassment and other acts of violence in general and how that conduct impacts the employment and, 2. actual assaults on co-workers that occur off-duty and off premises.

1. ASSAULTS IN GENERAL: A police officer was suspended after he became drunk and got into a fight in a bar. See, City of Fort Worth, 117 LA 1621 (Goodman 2002). Another police officer was discharged when he got into a fight with his girlfriend and brandished his firearm during the altercation. See, City of St. Petersburg, 104 LA 594 (Thornell 1995).

Another officer was reinstated where he got into a fight with his girlfriend after she became drunk and tried to crawl out of a moving car. There however, the “assault” was not an assault at all and the injury to the girlfriend was caused by the officer trying to keep her in the car and not fall out. See City of Minneapolis and Minneapolis Police Officers Federation, (Jacobs May 11, 2010) (Decision on file with State of Minnesota Bureau of Mediation Services.). See also, Broward County Sheriff’s Office, 121 LA 1185 (Wolfson 2005) (officer was reinstated after he got into a fight with his date in public and there was no showing of actual harm to the employer’s reputation).
In a publicized case in Minnesota an off-duty police officer got into a fist fight with a female outside a restaurant. Just his luck, the female was a County prosecutor in the very county he also worked. Due to the officer’s long and otherwise good service he was reinstated. See, *LELS and University of Minnesota Police Department*, BMS Case Number: 19 PA 0046 (Finkelstein 2019).

As with any off-duty case, the facts of the assault must be examined to determine if there is a nexus between the incident and the workplace? Were the employer’s interests harmed to the point where discipline/discharge is appropriate? Was there publicity involved with the incident? Would the public reasonably associate the conduct with the employer? What is the nature of the grievant’s employment and would the fact of the assault impact his/her employment?

2. **ASSAULTS ON/THREATS TO CO-WORKERS**

This involves assaults on co-workers or supervisors that occur away from work premises and while off-duty. Here the nexus may depend on whether the cause of the fight is related to work. In *Central Illinois Public Service Commission*, 105 LA 372 (Cohen 1995), the arbitrator upheld discipline where the employee struck a salaried employee in a bar after work while calling that person a “scab” for working during a lockout. It was apparent that the work situation was directly related to the reason for the fight.

There may also be a nexus if the assault is unrelated to work but there is evidence of a nexus between the fight and the workplace. Professor St. Antoine notes as follows:

“In some situations, the off-duty conduct’s nexus is obvious. Attacking a supervisor just outside the plant gate for example, has virtually the same effect on the business as would an attack just inside the gate. In other cases, the nexus may not be so clear. A fight at a bar between two employees might or might not provide the required nexus. If the reason for the fight was work related and the employees would have to work together every day the impact on productivity or safety could be severe. A fight for some other reason between two employees who never see one another at work, in contrast, probably would not provide the needed nexus.” See, *The Common Law of the Workplace* Second Edition, at Section 6.6 page 181.

Compare that however to a situation where co-workers get into a fight over something completely unrelated to work; for example, a woman or a sporting event. This too will of course depend on the facts. If the argument started at work and spilled out into a setting after work, these could be relevant facts that may lead to a finding of nexus adequate to support discipline.

Off-duty threats made about coworkers, managers or about the business may also be grounds for discipline even absent any actual physical harm. See, *Michigan Milk Products*, 114 LA 1024 (McDonald 2000) (employee made statements that someone should “go into that plant and shoot some people” and made references to the fact that he was “this close” to doing that himself.) Threats of this nature must be taken seriously even if the employee alleged that they “were just talking big” or “blowing off steam.”

In another case a c-worker, also a union member, was in the office with other employees. These employees worked with tools, including knives to perform their work and carried them with them. At one point, there was a discussion about these knives and in a scene reminiscent of the movie Crocodile Dundee, the grievant flipped open his very large knife, said, “That’s not a knife; this is a knife” and began waving it in the co-workers faces. They found this to be very threatening, especially coupled with the grievant’s other bizarre behavior. He was fired for threats to co-workers and the discharge was upheld. See, *IBEW #160 and XCEL Energy*, AAA # 65-300-00213-09 (Jacobs 2010).
PRACTICE TIP: For employers, it will be easier for an arbitrator to uphold discipline if there is a policy making it clear to the employees that threats of any kind, whether they are made at the premises or off, regarding doing physical harm to anyone connected with the business or physical harm to the plant will subject the employee to discipline. The policy should be clear that even statements made away from the premises are subject to the rule if they are directed in any way toward someone or something at work. I even saw one that drew an analogy to making a joke about having a bomb at a TSA security line in an airport – you just don’t do that and expect to have people shrug this off as a joke.

These kinds of statements made on Facebook or other social media page are certainly included, especially where the employee does not have a filter on such a page that limits access to just a select few. See discussion below.

However, even if the threat is made to only a few people online, how is that different from making the statement after work to those same people? Answer: it likely isn’t and the same analysis applies to a verbal statement as would apply to an electronic statement made over the Internet. If there is a connection to work, the nexus will likely exist and, depending on the statement, the context and other relevant circumstances, an employee may face discipline or discharge if the threat is serious enough.

OFF-DUTY HARASSMENT

Off-duty harassment of co-workers, customers or others who have a connection to the business may also provide a basis for discipline. It is important to show how the victims of the harassment are connected to the business and/or to show how they and the general public know that the employee is in fact connected to the business.

These cases too depend on their unique facts but the same sort of analysis applies: how is the employee’s conduct related to the business? Was there any publicity? Is there evidence that the employer’s reputation or other business considerations will be harmed by the employee’s conduct?

A bus driver was appropriately discharged for harassing a 13-year old passenger where the harassment occurred after she left the bus and the employee was off-duty. See, Oahu Transit Services, 122 LA 161 (Najita 2005). See also, Southern Bell Telephone Co. 75 LA 409 (Siebel 1980) (termination upheld where repairman contacted the customer after hours by phone and made harassing calls. There was a clear showing that the company had an interest in making sure that the public was comfortable letting such employees in their homes to repair equipment. Also, the incident became public on the facts presented).

One can imagine scenarios here involving an employee harassing an ex-spouse or business associate thereby creating harm to the employer’s image. Here the employer should be prepared to show that the harassment in fact happened, that the victim or target of this harassment knew that the employee was employed by the employer and/or any adverse publicity that ensued and whether any of that publicity identified the perpetrator as an employee. There may of course be other evidence that the employee is employed by the employer from other sources, especially in smaller communities as well.

CONDUCT THAT HARMs THE EMPLOYER’S REPUTATION OR IMAGE.

As a corollary to the discussion above, there are the cases where the employee’s conduct is alleged to create actual or potential harm to the employer’s reputation. Many awards in this area involve actions that the employer alleges will harm its reputation and bring an inchoate harm to its business.
This can take a number of forms and depending on the type of employer; it can be an actual loss of business, discussed above, or the loss of trust in the ability to carry out the business. This inquiry almost always involves the level of public notoriety of the conduct.

Some example of off-duty conduct that might impact the employer’s business follow.

**CRIMINAL MATTERS:**

A teacher convicted of physical abuse of their own child may provide sufficient nexus to warrant discharge. However, one arbitrator held that the school may need to show that the teacher has been publicly identified to the school’s detriment unless there is a showing of actual or real potential harm to the children at school. See *College of St. Scholastica*, 96 LA 244 (Bergquist 1991). See generally, *Common Law of the Workplace*, St. Antoine, BNA, 2d edition, (205) at Section 6.6 at pages 180-182.

Even in cases involving criminal activity that was publicized, some arbitrators may well overturn discipline if there is either no connection to the business operations or where there is insufficient evidence that the employee worked for the employer. In both cases the analysis proceeds on the question of nexus. In the first instance there must be a showing that the criminal activity will be deleterious to the employer’s operations.

An employee working in a bank convicted of embezzlement or theft – or robbing another bank – is most certainly going to get fired even if there is no publicity surrounding the conviction. A similar conviction of a person who does not handle money or valuable property may not face a similar fate however.

A teacher or school bus driver convicted of child abuse, a police officer convicted of theft or embezzlement, or a nurse convicted of fraud are fairly clear example of a nexus to the employer’s operation and of offenses that in most cases will result in discipline for the affected employees. A DUI offense for a laborer who is not required to have a driver’s license as a condition of employment or an assault charge stemming from a bar fight for a custodian may not. Each case will depend on the nature of the offense and, more to the point, the nature of the employment. Certainly, one offense may get an employee fired whereas that same offense may not for another employee in a very different job.

Certain types of employment may be judge differently. Police officers, teachers and other types of public officials charged with the “public trust” may be subject to a higher standard. See generally, Elkouri and Elkouri 7th Ed at Section 15.3.B.iv.

A police officer was reinstated but without back pay after he got drunk and got in a minor accident driving home. See *City of Minneapolis and Minneapolis Police Officers Federation*, (Jacobs April 16, 2004) (Decision on file with State of Minnesota Bureau of Mediation Services.) There the officer was able to demonstrate rehabilitation after the incident. The nexus was shown in a somewhat strange way in that he actually got the alcohol at a party in a police station at which many supervisors were in attendance.

In *HSSA and Dakota County, State of MN*, BMS # 13-PA-0248 (Jacobs 2014) a county probation officer was terminated for having a large marijuana grow operation on her property even though the employee claimed she was unaware of it. She blamed her husband.

The story went viral and the employee was identified as a county officer charged with making sure her clients did not engage in any illicit drug activity during their probation. Even though there was no evidence that she herself engaged in the smoking or the growing, the arbitrator found that she likely knew about it or turned an unreasonably blind eye to it. Her position and the publicity the case received was sufficient to sustain the discharge.
DRUG OFFENSES: A drug conviction of a drug counselor or a student advisor at a university who mentors young college students, including student athletes may well provide sufficient nexus to warrant discharge. The University had a legitimate interest in making sure its students, especially student athletes, do not engage in that sort of behavior and needed to assure parents and students alike that it took all reasonable steps to provide a drug free atmosphere for students.

In *Western Michigan University*, 115 LA 628 (Daniel 2000) the discharge was upheld where employee was arrested for possession of cocaine one block from campus. See also, *Willow Run Community Schools*, 112 LA 115 (Brodsky 1999) (Groundskeeper’s discharge upheld where employee drove vehicles and tested positive for marijuana).

A similar conviction of an employee working as a laborer groundskeeper or who works in the mailroom may not, since there would likely be insufficient connection between the conviction and a showing of actual or potential harm to the employers’ operation or reputation to warrant discipline. Likewise, a teacher convicted of drug charges away from work would also face a strong case for discharge given the sensitive nature of the charges and the clear need to provide a drug free environment for the children and the employer’s public image.

What about a student adviser at a college who is convicted of possession of some 7 pounds of marijuana who is frequently alone with college students, including student athletes, even though there is no actual showing that he intended to share or sell the pot to the students? Is that enough nexus and conduct that is sufficiently serious enough to warrant discipline?

There is also the question of whether there was sufficient publicity to connect the employee to the employer, even if the conviction itself was publicized. The mere fact that the conviction was public does not mean that there was enough evidence to establish an actual or potential harm to the employer’s reputation.

Off-duty drug use cases go in several directions depending on the nature of the offense and the nature of the employment. In *Schnuck Markets*, 102 LA 1016 (Suardi 1994), the discipline was overturned where there was no showing of any adverse effects on customer relations or on the employer’s reputation or business. Likewise, in *Wheatland Tube Co.*, 119 LA 897 (Frankiewicz 2004) the discharge was overturned even though there was a criminal conviction.

See also, *HSSA and Dakota County, State of MN*, BMS # 13-PA-0248 (Jacobs 2014). Employee was a probation officer charged with making sure clients stayed off illicit drugs yet there was a large marijuana growing operation on her property apparently run by her husband. Evidence showed that the employee was or should have been aware of it yet did nothing to report it or stop it. There was also considerable publicity about this.

Many arbitrators find that there is a distinction between possession of such drugs in an off-duty context versus the sale or distribution of drugs. The latter presents a somewhat stronger case for nexus, but that too obviously will depend on the overall record.

**PRACTICE TIP:** As noted herein, it is critical to provide evidence of a connection to the business and/or other relationships the employer needs to conduct its business. Merely relying on a drug policy banning drugs in the workplace may not be enough to warrant discipline where there is off-duty use.

While a conviction for off-duty sale or use of illicit drugs provides a better chance of establishing the nexus, typically a drug free workplace policy alone will not be enough to reach off-duty behavior without solid evidence of a connection to the work.
Some arbitrators hold that off-duty use of illegal drugs is not enough on its own, even where there may be a conviction of some sort, to warrant discipline. There must be a showing of harm to the employer’s business or the relationships the employer depends on by competent evidence. This will depend on the evidence but testimony of actual adverse feedback from customers or clients or even by co-workers might be enough.

**DRIVING OFFENSES:** Driving offenses can present thorny problems. Drunk driving offenses in most cases result in discipline for a police officer or school bus driver. There is certainly a connection but the question is whether there is adequate evidence that the off-duty driving offense will sufficiently adversely affect either the employee’s ability to perform their job, discussed more below, or the employer’s reputation in the community in the eyes of its customers and the public to warrant discipline or discharge. As discussed more below, certain classes of public employees are far more likely to face discipline and even discharge and be held to a higher standard off-duty conduct.

As an example of an off-duty DUI offense, a police officer was reinstated without back pay after he got drunk and got in a minor accident while driving home. See *City of Minneapolis and Minneapolis Police Officers Federation*, (Jacobs April 16, 2004) (Decision on file with State of Minnesota Bureau of Mediation Services.) There the officer was able to demonstrate rehabilitation after the incident and that he actually got the alcohol at a party in a police station at which many supervisors were in attendance.

Obviously, a bus driver who loses their commercial driver’s license due to a drunk driving conviction is no longer able to drive a bus and must not be allowed to do so. Whether that means they cannot do other jobs is a question for the contract but it likely would provide grounds to dismiss them from the driving position. See, e.g. *Metro Transit and Pope*, MN unpublished case (Jacobs 2019). The grievant lost his CDL and was unable to get it back in the time prescribed by the employer, Metro Transit, the bus company and was therefore no longer “competent” to drive. His discharge had to be sustained.

**LEGAL CONDUCT AWAY FROM WORK BUT WHICH OFFENDS THE EMPLOYER OR IS SEEN AS DISLOYAL**

**WORKING FOR A COMPETITOR:** It has long been the case that employees owe their employer a common law duty of loyalty. See Generally, *Common Law of the Workplace*, St. Antoine, BNA 2d edition, 205, at page 183. Thus, working for a competitor may be grounds for discipline especially if the nature of the employment could compromise a trade secret, business method or operation, or business relationship or other matter the employer sees as proprietary information. It could also be seen as distracting or making the employee too tired to work competently for the employee; i.e. healthcare workers or driver whose attention to detail is critical to the safe and effect operation of the business. See, *UAW Legal Services Plan*, 104 LA 312 (Imundo 1995); *Brauer Supply Co.*, 97 LA 526 (Cipolla 1991).

**DIVULGING SENSITIVE INFORMATION ABOUT THE ER OR ITS PRODUCT:**

This may be a violation of several employer policies and may also be a mixed bag of on and off-duty conduct. Obviously getting such information must be done while on duty – or least related to it but the conduct of divulging it may be done whole off-duty.

In these cases, the question will be whether there was a clear policy and whether there was notice to the employee of what sort of data or information is not to be divulged.

Some examples of this include: HIPAA or health care information. Most health care workers now know that patient information if strictly confidential.
Educational data. Again, most school workers know that information about students or their families is likewise confidential.

Investigative data on criminal matters. Also, pretty straightforward but there should be a policy the ER can point to.

Less obvious examples might be information about manufacturing processes or the products or marketing strategies. There should be a clear policy stating what is and what is not to be disclosed outside of work.

While I was not able to find any reported cases, it appears that working to undermine the employer’s business in some way might well also fall into this category under the same duty of loyalty theory. One could also imagine a social media post or You Tube video of employees saying or doing things that may not necessarily be illegal but which disparages the employer, or co-workers. See e.g. *Hills & Dales Gen. Hospital*, 360 NLRB No. 70 (Apr. 1, 2014); *Three D d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 31 (August 22, 2014); *Pier Sixty*, 362 NLRB No 52 (2015); *Hispanics United of Buffalo*, 359 NLRB No. 37 (December 12, 2012). All of those cases involved workers making disparaging comments about co-workers, the product or the clients. As one can imagine, the factual differences govern the results.

**DISPARAGING THE EMPLOYER, MANAGEMENT OR THE PRODUCT:**

Obviously, an employee who disparages the employer, its management employees or the employer’s product or operation runs the risk of discipline. See below for a discussion of social media and electronic dissemination of such material. Standing around the water cooler griping may be one thing, it may even be seen as “concerted action” under the NLRA or other applicable state statute, but writing a letter to the editor during a difficult contract negotiation time which is highly critical of the ethics or morals of the employer might well result in discipline being upheld. See *ATC/Vancom*, 119 LA 836 (Block 2003). See, Common Law of the Workplace, id at 183-84.

As an example, a meat packing employee tells his friends while off-duty, or sends out a message to some friends, talking about the way meat is handled in a packing plant that alludes to the fact that it is unhealthy or that corners are being cut with safety. Will this result in possible discipline if the employer finds out about it? It certainly could since there would be a clear nexus to the work.

The amount of discipline will depend on the message itself and other circumstances but the connection to the workplace is clear. (Note that this is different from a whistleblower situation where that statement is made to a government inspector or other authority regarding the way in which a business is operated. There the employee may be protected by state or federal law).

More on the edge, what if an employee wears a political button or publicly supports a candidate or social cause the employer does not agree with? Here arbitrators are far less likely to uphold discipline unless there is a very strong showing of actual harm to the employer’s business. Merely because management likes a political candidate does not generally give the employer license to muzzle employees while they are away from work.

Note that the employer may well establish and enforce a rule against wearing certain political buttons etc. while at work (although it should be non-discriminatory about it or run the risk of a disparate treatment charge to any discipline meted out) but this involves off-duty conduct.

Thus, if the manager happens to run into a worker at the grocery store or on the street wearing a political button the manager does not agree with, that fact alone is likely not grounds for discipline absent a very strong showing of actual or potential harm to the business. See, Common Law of the Workplace, Id. at page 183. See also, Social Media discussion herein. That frankly is typically how these kinds of message get disseminated these days.
CONDUCT THE EMPLOYER JUST DOESN’T LIKE

Can the employer discipline an employee just for associating with people the employer does not like or are associated with some social class or cause the employer does not agree with?

This will of course depend on the facts but an employer, especially a public employer will have a difficult time sustaining discipline except in fairly extreme cases and must be prepared to show a real risk of actual harm to its business or operation. See, Baltimore Transit Co., 47 LA 62 (Duff 1966), where the employee was terminated for his well-publicized association with the KKK and where minority riders threatened to boycott the bus company unless the offending employee was fired.

In many places a private sector employer can fire someone for political reasons. Assuming there is the proper set of facts and analysis of nexus, the employee who publicly supports imposing restrictions on an employer’s business may well face discipline. As one commentator put it, “can you bite the hand that feeds you and insist on staying for future banquets?” Common Law of the Workplace, id at 183, citing Forest City Publishing, 58 LA 773 McCoy 1972).

The same might not be said for the public sector however, although the answer will every much depend on the facts. See Baltimore Transit, supra. Would an employee who works for an agency providing supportive housing and services to developmentally disabled adults be subject to discipline for publicly supporting a political candidate who espoused severely cutting funding for such services? Would a rule against that sort of off-duty conduct even be enforceable? Would there be constitutional free speech protections for the affected employee? Such a case might well swing on whatever public comments the employee made and how they related to the actual work done by the employee as well as the level of publicity.

These cases will always rise and fall on their facts and will require the same showing of nexus as any other off-duty conduct case might.

DEFENSES TO DISCIPLINE/DISCHARGES CASES

INTRODUCTION AND SCOPE OF THE TOPIC

As the title suggests, we will go through the things unions and employees can raise as possible defenses to any discipline or discharge case. Note that this is not intended to be an advocacy for these defenses but is rather an instruction to both sides to be aware of the possible defenses to disciplinary action. Unions of course must know them, so they can assess whether to raise them. Employer’s too should understand what possible defenses are out there, so they too can assess whether their case is strong or whether there were missteps along the way that might prove harmful or even fatal to their case.

Different kinds of disciplinary actions require a showing of certain elements. Employees and unions may be able to raise specific defenses to those specific charges as well as more general defenses and successfully defend against the discipline proposed.

Time does not allow for a comprehensive discussion of every sort of case out there, but we will cover general defenses that can be raised to almost any disciplinary charge. Note too that certain specific charges have particular elements that need to be established, i.e. insubordination, or poor work performance to name a few. Be prepared to investigate these and argue that the necessary elements were lacking if you are defending such a case and do some research to determine what those elements are, so you know what you’re looking for.
DISCIPLINE AND DISCHARGE CASES:

Burden of Proof: In any discipline case the employer generally bears the burden of proof and the union can always simply argue that the employer failed to meet its burden of establishing any one of the elements necessary for just cause. Unions can also generally raise the issue of the quantum of proof necessary and typically argue that where discharge is at stake, the quantum should be high indeed – usually far higher than the preponderance of the evidence standard applicable to “regular” contact cases or where the offense and consequence is minor.

Preponderance of the evidence: The party with the burden must present evidence that it is at least more likely than not that a given fact occurred. This is the standard in civil court cases and the one most used by arbitrators out there. This is expressed sometimes as 50% plus 1.

Clear and convincing: No set standard here but requires a little more than a 50% + 1 showing. This usually requires more than a preponderance but is a very loose standard.

Beyond reasonable doubt: criminal standard and is a very high burden to meet indeed. Some unions will argue that a higher standard is required where the offense involves criminal acts – i.e. theft, assault, sexual misconduct, fraud and criminal damage to property cases. Not every arbitrator uses this, but many will require something more than a bare minimum standard of evidence to establish more serious offenses.

THE “7” TESTS AND POSSIBLE DEFENSES BASED ON THEM

The “7 tests” derives from Arbitrator Carroll Daugherty who first articulated them in Grief Bros. Cooperage Corp., 42 LA 555, 558 (1964). Daugherty and others have indicated that a negative answer to these questions may mean that there was a lack of just cause for discipline. That is not always the case and not all arbitrators use all these tests all the time, particularly those pertaining to the investigation. They do however provide an analytic framework for assessing whether there is just cause or not. These were set forth above in some detail and will be repeated now in summary fashion.

These tests are set forth as follows:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

2. Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee? – Is the rule too vague? See, UNITE HERE and MN Sports North (unpublished Jacobs 2013). Employees were required to card everyone who “appeared to be under 30” and were fired where a person who was 28 was not carded.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?47

4. Was the company’s investigation conducted fairly and objectively?

5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?

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47 Daugherty wrote long before the Court’s decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), but the general concept appears to be the same. Give the employee a chance to explain what happened or to provide any exculpatory evidence or mitigating circumstances before the disciplinary action is taken.
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?48

At the end of the day no case ever contains all these elements as significant parts of the analysis — indeed if it did, it would never see the light of day and be settled long before it got to arbitration. Usually only one or two of these elements comes into serious play.

Finally, most arbitrators do not use these tests religiously. Many require notice, an investigation that is free from evident bias, adequate proof of guilt of the offense, an analysis of disparate treatment and a reasonable penalty. This is an abridged version of the 7 tests but there are in reality probably fewer than 7.

Moreover, a “no” answer does not always equate with the reversal of the discipline. An investigation can be badly flawed and yet the grievance denied if there is sufficient evidence to establish that the employee did the offense and it was serious enough to warrant the penalty imposed

GENERAL DEFENSES THAT CAN BE RAISED TO ALMOST ANY CHARGE

DISPARATE TREATMENT – Has the employer applied its rules evenhandedly? If there are differences in treatment be prepared to explain them — are there differences in the length of service, the notice that was given, has the rule changed, what was the nature of the offense and what is the comparison of the grievant’s record compared to others?

The issue here may well be whether the offenses and facts are indeed the same and whether the grievant’s record and all of the underlying circumstances are similar enough to warrant finding of disparate treatment.

Unions must be able to explain any differences and if possible, show that there was something uniquely harsh about this discipline as opposed to others in the past.

LAX ENFORCEMENT – closely tied to disparate treatment — have some employees been treated differently or have people even “gotten away with things?” This is in some measure the “todays favors become tomorrow’s demands” theory. See Elkouri, 8th Ed at 15.3.F.xii and LA CDI 100.15, 100.33, 118.67 and 118.656.

General rule is that you cannot decide suddenly to discipline people for things everyone has been doing without consequence.

One question remains though — did the employer know about it? If “everybody” was doing it, but no one knew about it at a management level, this may impact the outcome. Were people hiding it? If so, it may not be a good defense after all.

Has the employer winked at this or not been disciplining people in the past? For example, if there is a seat belt rule, but supervisors would not discipline people if they caught them not wearing them but merely asked to put them on, can they suddenly suspend someone for not wearing one now? Answer: maybe. It will depend on how long this has been going on.

Also, if the employer is aware of the lax enforcement of a rule, it can certainly notify people that as of now, the rule will be enforced strictly. The employer should make sure everyone knows about the stricter policy.

48 This note shows quite clearly that Daugherty was writing about his experience as a railroad arbitrator. This view is not universally held by all arbitrators. Elkouri notes that the determination of the appropriate penalty frequently depends on the seriousness of the charge, the length of service and overall record of the employee. See generally, Elkouri and Elkouri, How Arbitration Works, BNA 7th Ed at section 15.3.E.i at pages 15–28 to 39.
POOR INVESTIGATIONS – Was it a witch-hunt? Did the employer miss facts that can create doubt in the arbitrator’s mind? Was everyone interviewed who may have had knowledge? If not, why not?

The union has some duty of investigation as well and if it does a better job of finding witnesses, this too can be a powerful defense. It can mean one of two things, or both, that the employer missed crucial facts and the investigation appears to have been an afterthought or discipline a foregone conclusion and second, that the facts are not as the employer asserted, especially if the union finds witnesses who can refute the employer’s case.

Was the discipline imposed BEFORE or AFTER the investigation was done? If the Employer sent the letter out too early, it may not be able to get all in the information gathered afterward. There may be some exceptions to that but be careful to have all the facts before discipline.

DOUBLE JEOPARDY

This is essentially the same as in the criminal law and provides that an employee cannot be disciplined twice for the same offense. Elkouri notes as follows: “Once discipline for a given offense is imposed and accepted it cannot thereafter be increased. … The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. Elkouri 8th Ed at 15.3.F.vii (See also LA CDI at 118.41 for case citations).

Note though that this does NOT mean that prior offenses cannot be used to justify greater discipline later on. Prior record – good or bad – is a frequently used factor in determining the degree of discipline.

Note too that suspensions pending investigation does not preclude a termination later – as long as the suspension is given “pending investigation” and is not shown to have been the final discipline.

In one case, an employee whose job was parking cars, damaged a customer’s car and was asked to take drug test but refused. He alleged that other workers were not required to take a drug test and was suspended for one day as the result. The evidence showed that he was told that the 1-day suspension was a final discipline.

Later, when a manager got wind of the facts, the employer attempted to fire the employee. The doctrine of double jeopardy was invoked successfully by the union and the employee was reinstated. See, IBT #120 and AMPCO, FMCS # 130214-53289-3 (Jacobs 2013).

Once there has been a “final discipline issued, the employer may not change it. Note though that this is different form using prior discipline to support a greater degree of discipline in a subsequent case.

Finally, the fact that the employee may have been criminally charged, for example getting a traffic ticket for the same conduct, does not preclude discipline by the employer. Charges or actions taken by another agency are generally not considered a basis for double jeopardy.

DEFENSES TO THE PENALTY – WHERE THE VIOLATION HAS BEEN SHOWN:

Length of service – may be a factor. A longer-term employee with a good work record may deserve more leniency than a short-term employee. Elkouri notes as follows: “long service with the company particular if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration.” See, Elkouri 8th Ed at 15.3.F.ix (See also LA CDI 118.33).

Elkouri notes though that there is some disagreement among arbitrators as to how far a prior record can be carried. First, if the offense is so egregious or constitutes a “cardinal rule” violation, even very long-term employees may be fired.
Further, not all arbitrators accept that length of service is a mitigating factor. Most do however, and this is a well-accepted defense even where some rule violation has occurred.

**Prior record** – this is clearly a factor. If the employee’s record is otherwise clean and good that too may well be a factor here. Arbitrators usually take that into account. See Elkouri 8th Ed at 15.3.F.viii.

A prior record that is devoid of discipline and shows that the employee has been “good” and has not been in trouble before provides an argument that the employee understands the rule and will follow it in the future and that this offense will not recur.

This can of course be a double-edged sword though and an employee with a checkered past may not be successfully able to use this in the future. These cases are very fact dependent.

One issue sometimes arises in “old” discipline. While there may be a clause calling for old discipline to “fall off” the employee’s record, bringing up a claim that the employee has a clean or otherwise generally good disciplinary record may well open the door to an employer – by way of rebuttal – to bring up past discipline to refute that claim.

Unions: be careful of this defense and make certain the grievant really has a good work record.

**Good work performance and positive reviews** – is the employee regarded as a good worker but made a few mistakes or has some problem with attendance, etc. That too may be a factor in determining whether to give the employee another chance. See, discussion above.

Longer term employees have sometimes been regarded as having built up a bank of good will that may mitigate some disciplinary consequences and serve to reduce it.

On the other hand, employers can argue that a long-term employee “should have known better” and that the length of service may work against the employee. This will be a very fact dependent case and may well depend on how remorseful the employee is and whether there is convincing evidence that the employee acknowledges the mistake and won’t do it again.

**CONTRACTUAL DUE PROCESS REQUIREMENTS**

Some contracts have specific due process requirements that must be followed. For example, the US Postal Service contracts typically have a requirement that any discipline be reviewed by an independent concurring official who is at a higher level than the issuing manager or supervisor. Further, the decision cannot be a “command decision,” i.e. one that is dictated by a higher official essentially telling the lower official what to do. It must, in other words, be an independent review on an objective basis.

**CONTRACTUAL PRE-REQUISITES FOR CERTAIN DISCIPLINE**

In one case the CBA provided as follows: “… The right of discharge or disciplinary action shall be exercised by the Employer only after the [employee] has been previously warned and after written notice of the existence of cause has been given to the [employee and] the Union.”

There was evidence of fairly serious misconduct by the employee in that case but also evidence that in the past, even in cases of assaults and very serious conduct, the clause had been applied to require a warning to the employee BEFORE any discipline could be issued. See, *Twin Cities Musicians and MN Orchestra*, FMCS Case No. 150320-017860-8 (Jacobs 2015).

I frankly found that clause to be curious at best, but that was what the parties agreed to and had to be enforced as written and, equally as importantly, as applied historically. There was evidence that in the past even a physical assault was not treated as a discharge because there had not been the notice as required by that clause.
Failure to adhere to those requirements can provide a valid defense to the discipline and it comes up in those cases. Unions should be keenly aware of those requirements and whether there were any facts that could arguably give rise to them.

**DUE PROCESS ISSUES; DISCLOSURE OF INFORMATION**

**Witness statements and documents** – it is generally well established that the union has some right to information in order to prepare a defense to a discipline case. The NLRB has recently taken this issue up and has issued two recent decisions that might impact this discussion. See, e.g. *NLRB v. ACME Industrial Co.* 385 U.S. 432 (1967), where the Court outlined the circumstances and the types of information that can be requested from an employer by a union in the process of investigating a grievance. There are other cases certainly that have discussed this issue.

In *American Baptist Homes d/b/a Piedmont Gardens*, 359 NLRB #46 (2012) and 362 NLRB #139 (July 26, 2015) the Board overturned longstanding policy in *Anheuser-Busch, Inc.*, 237 NLRB 982, 984–985 (1978) with respect to witness statements and made them much more accessible to unions. The older case held that witness statements were subject to a blanket exclusion.

The Board held that it would “apply the balancing test set forth in *Detroit Edison v NLRB*, 440 U.S. 301 (1979), as we do in all other cases involving assertions that requested information is confidential.” Under *Detroit Edison*, the Board balances the union’s need for requested information against any “legitimate and substantial confidentiality interests established by the employer.”

In *American Baptist Homes* the employer took statements from a co-worker of a fired employee regarding alleged workplace misconduct, i.e. sleeping on the job. The employee was directed to prepare a written statement outlining what she saw. That was done, and the employee was fired.

The union requested copies of any and all statements taken and relied upon in support of the termination and the names of all witnesses interviewed. The employer refused.

There was also a second co-worker who alleged that she had seen the employee sleeping on the job and she too gave a statement to that effect. In neither case was there any promise of confidentiality nor no one asked for the second co-worker’s statement at all – she apparently volunteered it and gave it to the supervisor.

The Board held that it would, on a case by case basis, balance the union’s need for the relevant information against any “legitimate and substantial confidentiality interests established by the employer.” See Slip op at page 3, citing *Detroit Edison*, supra at 318–320. See also, *Pennsylvania Power Co.*, supra at 1105; *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984). The Board also noted that “The confidentiality interest of the employer . . . is not fixed; it may vary with the nature of the industry or the circumstances of a particular case.” Id.

The Board provided some guidance here and noted that “An employer must instead “determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up.” Thus, the employer must have more reason than simply to keep the identity of the witnesses confidential in order to withhold the statement. The Board went a bit further and stated that even if there is a showing of a need for confidentiality, there is still a requirement to make an accommodation so that the information can be disclosed while still, protecting the identity of the maker of the statement.

There is still too the need to provide more than a mere allegation of misconduct or the mere existence of a statement regarding that conduct in order to prevail at hearing. At some point if the employer intends to use the information contained in the statement it is going to have to either provide it or get the person who made it on the witness stand.
If there is a sense that the employer is playing games with that, the arbitrator could either refuse to allow the witness to testify – somewhat unlikely – or provide more time to prepare a defense to the information contained within it or discount the information depending on the facts. There could also be a claim that the employer is hiding possible exculpatory evidence that could backfire.

The Board recognized that there may be legitimate reasons for withholding information but gave little guidance as to what those situations might be. One could perhaps argue that if there were a very real chance of intimidation or witness tampering, the need to maintain confidentiality for purposes of ongoing criminal investigation or the need to protect the identity of a witness for some other reason, the employer will be justified in withholding a witness statement.

How these issues will play out in the public sector given the various freedom of information laws in place or a given state law provisions is unclear in the absence of specific facts but it is apparent that the Board leans in favor of disclosure given the holding of this case.

In a companion case, Stephens Media, 359 NLRB #46 (2012) the Board re-affirmed the American Baptist d/b/a Piedmont Gardens decision.

In a somewhat unusual twist in the Stephens Media case though, there were some other issues involving statements and concerted activity. The Board was faced with a claim by the employer that employees who made a secret recording of a supervisor should be fired for their conduct. The Board ruled that their conduct was concerted and that they had violated no policy or law.

The D.C. Circuit Court in Stephens Media, LLC d/b/a the Hawaii Tribune-herald, Nos. 11–1054, 11-1088 (D.C. Circuit Court of Appeals April 10, 2012), affirmed the Board and held that employees who made a secret recording of their supervisor following the discharge of a union steward did not violate the Act and were in fact engaged in concerted and protected activity.

The company had discharged a union steward for allegations of misconduct. Later several employees made a secret recording of the supervisor and were later disciplined for that. They claimed that they were engaged in concerted activity, there was no policy against it and no state law against such recordings.

The NLRB agreed, and the Court enforced the orders reinstating the employees.

For example, were all of the relevant documents and witnesses disclosed when requested? Were there statements taken and were they disclosed.

Unions: review the process that was used. Did it fully comply with any negotiated process in the CBA? If not, be prepared to show some prejudice or adverse consequences as a result. Even if the employer has not given you information, that may not be fatal to the employer’s case and may well provide a basis for the arbitrator to grant additional time to review it, but a union can argue that the failure to disclose relevant information is evidence the employer was trying to hide something. How far that flies will depend on the facts however.

Employers, should thus be aware of them too so they do not ignore or gloss over them.

WEINGARTEN, GARRITY AND LOUDERMILL ISSUES

This discussion is not intended to be an exhaustive study of these important procedural rights, but they do arise, and they can affect an employer’s case for discipline as well as raise procedural objections to the admissibility to pieces of evidence/statements allegedly garnered in contravention of the rights guaranteed by certain parts of the holdings of these cases.

Weingarten: NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). This case essentially requires that employees who are about to be interviewed in an investigation that may lead to discipline must be given the right to union representation. The Weingarten “rules” have been distilled to these:
**Rule 1:** The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request.

**Rule 2:** After the employee makes the request, the employer must choose from among three options. The employer must: grant the request and delay questioning until the union representative arrives and has a chance to consult privately with the employee; deny the request and end the interview immediately; or give the employee a choice of having the interview without representation or ending the interview.

**Rule 3:** If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal.

In one case, the employer had the employee come in for what it described as a “preliminary investigation” of allegation that the employee punched others’ time cards. The employee asked if she needed Union representation and was told she did not. Later, statements made at this meeting were introduced as evidence in the hearing. That request was denied, and the case overturned on other grounds.

The employer asserted that it was not clear that the employee wanted union representation, but the facts were clear that the employee asked the investigator if this was a disciplinary meeting and whether she should have union representation. She was told it was not and told she did not need representation. She was thus induced into believing the meeting was something other than what it was. See, *University of St. Thomas and IBT 120*, FMCS 070617-57235-3 (Jacobs 2008).

The arbitrator held that any statements made at this meeting couldn’t be used later as the basis of discipline. This is a bit like the “fruit of the illegal tree argument” used in the criminal courts when there is a Miranda violation. Thus, employers need to be careful and make sure they do not misrepresent the nature of the meeting and that they make sure it is very clear that the employee is waiving their right to representation and that they are told clearly what the nature of the meeting is and that statements made there may be used to determine discipline later.

**Garrity:** *Garrity v New Jersey 385 U.S. 439 (1967).* This case applies almost always to the possible discipline of a law enforcement officer. This case essentially requires that before a law enforcement agency can discipline an officer for refusing to answer questions, the agency must do the following:

- Order the officer to answer the questions under threat of disciplinary action,
- Ask questions that are specifically, directly and narrowly related to the officer’s duties or the officer’s fitness for duty, AND
- Advise the officer that the answers to the questions will not be used against the officer in criminal proceedings.

If, after being given this warning, the officer refuses to answer the questions, the officer may be disciplined for insubordination. It requires that the officer assert their Garrity rights but most public employers, especially the smart ones, will make sure that the officer is advised of his/her Garrity rights before the interview. Failure to do so may affect the ability to discipline the officer later and avoid confusion so most of them have the officer either sign or acknowledge on the record that they were advised of their Garrity rights before the interview started.
These statements usually advise the officer that their employer is conducting an investigation for possible disciplinary action and that they are required to provide the employer with all requested information and that if they refuse they will be subject to discipline and that any statements made under the threat of discipline or evidence obtained from those statements may not be used against the officer in any criminal proceeding.

**Loudermill**: *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Loudermill requires a hearing *prior to the discipline being issued* to provide the employee an opportunity to explain and refute any conclusions the employer reached which caused the employee's discharge.

Loudermill does not require that the employee or the union be allowed to cross examine witnesses as long as there is an opportunity for a full-blown hearing later – i.e. arbitration. Some courts have even held that the employee does not have the right to legal counsel at this hearing. See *West v. Grand County*, 967 F.2d 362, 368 (10th Cir. 1992). The employee may have right to union representation however in order to protect the employee’s due process and union rights.

This “hearing” is thus not elaborate and is an opportunity for the employee to provide any explanation for what happened and is intended to be a check on obvious mistakes. Several well-respected commentators have discussed the Loudermill holding and its implications and meaning in the context of providing due process and just cause for terminations. Professor St. Antoine notes as follows: “It is generally accepted that some level of procedural due process is owed by employers to employees in the imposition of discipline and discharge. The scope of protection will usually be greater in the public sector than for employees in the private sector.” See, *Common Law of the Workplace*, St. Antoine BNA Books, 2005, section 6.12 page 201 (Professor James Oldham).

He notes further “public sector employees often enjoy a heightened level of due process derived from federal or state constitutions. (Citations omitted). Procedural due process rights that have been identified by the Supreme Court as constitutionally mandated by the Fifth Amendment (which have been extended to public employees at the state level through the Fourteenth Amendment) include: a pre-termination hearing giving the employee notice of charges lodged against the employee and an explanation of the employer’s evidence and an opportunity to be tell his or her side of the story.” (Citing *Cleveland Board of Education v Loudermill.*) *Common Law of the Workplace* at 203. See also, section 6.13, wherein Professors Oldham and St. Antoine note, “Just cause requires that an employee being disciplined or discharge be given notice of the charges against him or her and a meaningful opportunity to be heard.” Thus, these requirements have long been part of the underlying notion of due process but were more or less formalized in the Loudermill decisions and its progeny.

It is generally not a problem as the time-honored standard in discipline requires the employer to conduct the investigation before issuing the discipline and it is the rare case where an employer fails to do this. But Cf, *Moorhead Public Service Comm’n and IBEW #1426*, State of MN BMS case # 09-PA-0709, (Jacobs 2009) where the employer candidly admitted that they never talked to the employee before firing him, had never even heard of a Loudermill hearing nor was the manager aware of that requirement and believed that since the employee had a right to arbitration they did not need to provide any opportunity for the employee to explain what happened or to know why he was being fired. For what it’s worth, the employer *has* heard of Loudermill now.

**THE “TROUBLED” EMPLOYEE**

Professor St. Antoine in his work, *The Common Law of the Workplace*, BNA Books 2005 at sections 6.24 - 6.29, discusses the notion of a “troubled employee.” This can, in some circumstances, provide a defense to sometimes very serious behavior. It is not a panacea but is worth a look by both sides in a discipline case. This can be a successful defense if the facts are just right and I have seen this work in cases of assault, drug/alcohol addiction or mental illness.
St. Antoine defines a “troubled employee” as one who is addicted to drugs or alcohol or has a serious mental illness. See Section 6.24. If the union can establish that the employee was troubled, within the definition and that the employer was aware of this, they may be able to successfully defend against serious discipline or discharge by referring to the notion of a troubled employee and argue that the employer should have provided some assistance rather than disciplining the employee.

Keep in mind that the union bears the burden of proof on these issues. First, the union must show that the employee is truly “troubled” and meets the definition. St. Antoine provides as follows: “An employee who takes drugs or drinks to excess is not necessarily a troubled employee. … The fact that the employee is addicted must be established since the critical underpinning of any special treatment for the troubled employee is that the employee was not responsible for misconduct.” Id. at 6.24 and page 239.

St. Antoine notes though that simply being stressed is not enough to qualify, nor is the occasional use of drugs or alcohol. Unions will likely need a medical diagnosis of some sort to meet the burden of showing that the employee as troubled. St. Antoine notes that alcoholism and drug addiction have long been considered illnesses and some state laws provide for allowance of treatment before termination. See, St. Antoine at Section 6.25, page 241. See also, Section 42 USC 1211 exempting any employee who currently engages in illegal use of drugs. The question may be whether use of legal marijuana constitutes an illegal use of drugs. The ADA however does not govern the results in arbitration. The CBA and the just cause analysis do.

St. Antoine notes that there is a vast difference of opinion among arbitrators as to what to do with troubled employees. See Section 6.37, page 247. He notes that many arbitrators afford no special consideration to troubled employees and apply standard just cause analyses to any discipline issued. The question of whether they are troubled does not apparently enter the picture.

Others require that if the employee is truly troubled, and the union has met its burden of proof in that regard that the employee be treated in a non-disciplinary way. (Some state laws require that employees be afforded the chance to go to rehab if there is evidence that their behavior is due to addiction. This may well be a reflection of those types of laws.)

Addiction itself should not be grounds for discipline if there is no evidence of impairment at work. See St. Antoine at section 6.25, page 242. Some arbitrators will impose a non-disciplinary remedy, such as re-assignment or EAP.

Note that the employer may be able to show that absence of addiction is necessary for the employee to continue in any capacity but should be prepared to show that there are no other positions the employee could perform while they undergo treatment.

Possession or use on the job of drugs or alcohol is a very different offense and may well provide a separate basis for discipline. Different facts may yield a different result but, if the addiction or mental illness is shown to exist by a medical diagnosis and was the cause of the employee’s actions for which they are being disciplined, the union may be able to argue for a lesser penalty than discharge.

As noted above, if there is use on the job or the job itself requires absence of addiction or drug use that may be a factor in the employer’s favor, but the union can still argue that the employee should be allowed to seek treatment before being discharged. That may not always work depending on the facts but in a case where there is only a positive test and no evidence of use or possession on the job, it may be a possible defense.49

49 The issue of marijuana is complicated in that the operative chemical, THC, can last in the body for 30 days or more but the impairing effects of it do not. There is not yet a generally accepted standard for showing “impairment” in the scientific community, or the labor relations community of that matter, as there is with alcohol. These cases will be very fact specific as one can imagine.
MANAGEMENT ALSO AT FAULT

This arises occasionally in assault cases where the supervisor is also found to have been at fault or even started the altercation. This will of course be very fact specific.

If it can be shown that the supervisor was also partially at fault for what occurred an arbitrator may be persuaded to mitigate the penalty. See, Elkouri 8th Ed. at 15.3.F.xv. Elkouri describes cases where the supervisor was either complicitous in a physical assault or acted in such an aggressive or disrespectful manner that it caused the assault. See Section 15.3.F.xv.

Elkouri also discusses cases where the supervisor’s actions in denying certain accommodations were shown to be a mitigating factor and even a precipitating factor in causing the employee’s actions. See, Dial Corp, 107 LA 879 (Gaylord 1997).

These cases too will be fact specific but be aware of what precipitated the event and be prepared to argue that the supervisor took some action that may have caused the offense or should mitigate the penalty.
WHAT’S THIS MEAN? USE OF CONTRACT LAW PRINCIPLES TO INTERPRET LABOR AGREEMENTS
MONTANA BOPA CONFERENCE 2020
JEFFREY W. JACOBS
Arbitrator

INTRODUCTION AND SCOPE OF THE TOPIC

In any contract interpretation case, the issue is usually about what the parties intended. What the language means and what the parties truly intended when they negotiated it is not always easy to determine, especially when the parties are telling you the language means very different things. Labor arbitrations involve a somewhat special set of rules about how to interpret contracts and the language within it but some knowledge of contract interpretation principles can be very helpful. This is by no means going to be an exhaustive study of all of the rules in contractual interpretation one might get in a first-year law school contracts class, but will discuss some of the more prominent and widely used rules to aid in the interpretation of language.

We will also touch on those unique rules that apply to labor contracts. Most arbitral scholars and commentators have recognized that collective bargaining agreements are not ordinary contracts even though certain standards of contract interpretation are borrowed from common law principles going back centuries. There is a unique need for flexibility in labor agreements flowing from the fact that a collective bargaining agreement is not an ordinary commercial bargain but “an effort to erect a system of industrial self-government.” Common Law of the Workplace, St. Antoine, 2d Edition, 2005 BNA, @ section 2.1, page 69-70. (Citing Steelworkers v Warrior and Gulf Navigation Co., 363 U.S. 574, 580, 46 LRRM 2416 (1960).

THE PRIME DIRECTIVE – DETERMINING THE INTENT OF THE PARTIES

The main focus of any contract interpretation matter is to determine the intent of the parties when the contract was negotiated – not when the grievance arises or when the case is heard. The starting point is of course the contract language itself. There are some general principles that are generally applied.

RESERVED RIGHTS THEORY

Many, if not most, arbitrators start with the premise that the employer retains all authority to direct the workforce and manage its business or operation as it sees fit except as limited by the terms of the CBA or by law. See Labor and Employment Relations Arbitration, Nolan (1998).

Unions will argue that the contract does not specifically allow the employer to do something. That seems to have the argument backwards in many cases. The question is not whether the contract allows it but whether the contract prohibits it. If it does not the union will need to find some basis for limiting the employer’s action based on contractual language, practice or other evidence to demonstrate intent.

Other arbitrators find that unions can gain rights by inference from a reading of the CBA as a whole or from different clauses. This will depend on the facts and on the CBA clauses at issue. It still involves an analysis of the parties’ intent. The question is always this: did the parties intend the particular limitation being sought? These questions will of course involve the application of the various rules set forth below – i.e. is the language clear? If not, what tools can be used to determine intent based on the language itself and how it is used or from extrinsic evidence that may help to determine what the parties intended.
Work Rules – arbitrators generally uphold management’s right to promulgate reasonable work rules as long as they do not conflict with the CBA or law. See ME International, Inc. 117 LA 307 (Szuter 2002); Branch County Michigan Road Comm’n, 114 LA 1697 (Allen 2000). Note though that the application of those rules is generally subject to the grievance procedure, especially where that involves discipline or other matters that are covered under the CBA.

Note though that work rules that are unilaterally implements or promulgated are not generally regarded as contractual. They are within management’s power to create but may well be subject to the grievance procedure and/or the just cause provisions of the agreement.

IMPLIED OBLIGATIONS THEORY

Unions on the other hand frequently espouse the implied obligation theory and contend that it is impossible to negotiate a labor agreement that covers every single detail of every practice that may exist out on the shop floor or in the employer’s business. They argue that any labor agreement is thus subject to those existing practices to the extent they are not specifically limited or negated by the language of the CBA. Unions also assert that while the employer may have had unfettered discretion to operate the business prior to the CBA being in place, the document changes the underlying relationship and implicitly makes the union a party too many workplace decisions. See, Common Law of the Workplace, St. Antoine, 2d Ed, 2005, Section 3.2 and 3.5 at pages 100 - 104.

Professor St. Antoine notes that “some arbitrators subscribe fully to the theory to implied management obligations, holding that the mere existence of a collective bargaining agreement imposes certain limitations on management decisions that would significantly impair the employee’s job security and work opportunities or the integrity of the bargaining unit itself.” See, Common Law of the Workplace, supra at Section 3.5 page 103.

On the other hand, he also notes in the following section that “some arbitrators agree with management that the growing global market and foreign competition, lack of profit, or the need for a better business environment and lower labor costs requires swift and unilateral decisions even where union employees may be adversely affected. Although the employer’s unilateral decision may not violate the agreement because there is no specific provision prohibiting it, such action may be an unlawful refusal to bargain in violation of state law or section 8(1) (5) of the NLRA.” Id at section 3.6 and page 104.

At the end of the day there is no perfectly clear answer and as always, the outcome will depend on the language and bargaining history and perhaps even past practice between the parties. Professor St. Antoine notes too that many arbitrators apply a somewhat mixed standard depending on the contract language and that the outcome will depend on what it is that the union is challenging. Those items that have “traditionally” been regarded as within management’s sphere, such as production methods and use of technology, are likely to be left in management’s discretion. Other matters that might affect the work environment or the integrity of the bargaining unit might be subject to greater arbitral review under a general union security clause, a maintenance of benefits clause (discussed more below) or even a seniority clause – depending on the issue.

IS THERE A CONTRACT AT ALL? MUTUAL ASSENT

Before turning to the interpretation of particular language it is sometimes argued that there was no agreement at all and that the contract is invalid because of it. In the common law, unless there is a meeting of the minds, there is no contract and the parties go their separate ways. See, Simpson on Contracts, 2nd Edition West Publishing, 1965; See also, Restatement of Contracts, Section 22. This is sometimes referred to as mutual assent and requires that parties manifest to each other mutual assent or agreement to the same bargain at the same time. If they do not, then under common law no contract is created. See also, Restatement of Contracts (Second) Section 201 (1981).
That is typically not what happens in labor agreements however. The US Supreme Court stated that a collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate … the arbitration of labor disputes … is part and parcel of the collective bargaining process itself.” See, Steelworkers v Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960).

There are many times when the parties either do not anticipate or even discuss a particular scenario because they never considered it at all or they did consider it but got the contract done and left some ambiguity in it to be determined later. This does not invalidate the contract it merely allows for the dispute to be determined later. Once there has been a determination, the parties retain the ultimate power to “fix” it through negotiations in the next round of bargaining. (Nothing like lifetime employment for labor relations professionals.)

Elkouri has perhaps the best pronouncement on this issue as follows: “when the parties attach conflicting meanings to an essential term of their putative contract, is there then no “meeting of the minds” so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.” Elkouri and Elkouri, How Arbitration Works, 6th Ed. at p. 428.

Elkouri further notes, citing Colfax Envelope v Graphic Communications Union, Local 458-3M, 20 F. 3d 750, 145 LRRM 2974 (7th Cir. 1994), that “when parties agree to even patently ambiguous terms, they submit to have any dispute resolved by interpretation. That is what courts and arbitrators are for in contract cases – to resolve interpretative questions founded on ambiguity.” See, Elkouri at p. 429-30.

Thus, in a case where the union insisted that causal employees be covered for weekend bonuses and where the parties signed the agreement with the weekend bonus for casual employees in it, that clause was part of the contract and enforceable by arbitration. The employer had argued that it never intended that it be there and that it was absurd to pay casual employees a weekend bonus since by their very nature most of them only worked on weekends anyway. The employer asserted that there was no mutual assent to that result and that there was no contract at all. (It was not clear what the employer intended the arbitrator to do here even if it had prevailed since on the one hand it argued there was no contract yet also had argued that only this provision be excised from it.)

Several things were important. First, the contract was clear and included casual employees in the definition of “employee.” Second, all employees were to be paid the bonus – there was no exception in the agreement. Third, and perhaps most importantly, there was a specific discussion about this at the table and the union insisted that casual employees be covered in the definition of the term “employee” and even threatened to walk out of the negotiations over it. The employer agreed to this and even signed each and every page of the agreement.

The employer argued that due to the failure of a “meeting of the minds,” there was no contract at all. On these facts, the arbitrator ruled that there certainly was a “contract” and the grievance procedure was inserted to deal with this type of dispute and to have an arbitrator decide the matter. Further, it was clear that the parties intended to include casuals, as curious as that was. See, SEIU Local #113 and St. Francis Regional Medical Center, FMCS case # 060209-53378-7, (Jacobs 2006).
STANDARDS FOR INTERPRETING CONTRACTS – OBJECTIVE VERSUS SUBJECTIVE APPROACHES

There is some difference of opinion as to whether the objective or subjective approach in reading contract language should be used. Each has its proponents and advantages.

The objective approach holds that the meaning of the words and language used in a contract is that which would be attached to it by a “reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than the oral statements by the parties of what they intended to mean.” Elkouri, 6th Ed. at page 431. This approach has an obvious bias toward common meanings or dictionary definitions of words and eliminates the need for a factual determination of what the parties may have intended or believed.

Dictionary definitions can have different meanings as well so it is important to be clear about what is meant by terms. If the words are intended to have a special or technical meaning particular to an industry parties should be careful to discuss that or memorialize it in some way.

The subjective approach defines interpretation as the ascertainment of the meaning of an agreement or a term thereof as intended by at least one party. However, the intention of a party is the intention manifested by him rather than any different undisclosed intention. Simpson seems to support this view as well. “Under the theory of mutual assent which today universally abounds, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real or secret intention differs therefrom, it is entirely immaterial.” Simpson on Contracts, 2d Ed. West Publishing 1965 at p 8-9.

Parties’ mental processes are not relevant in either of these approaches. What somebody privately intended is not at all germane. What is relevant, where it exists, is the outward manifestation by that party of the meaning of the language. Or, as Elkouri notes, “where the parties have attached different meanings to an agreement … it is interpreted in accordance with the meaning attached by one party if at the time the agreement was made that party did not know or had no reason to know of any different meaning attached by the other, and the other knew, or had reason to know that the meaning attached by the first party.” Elkouri, at page 432. In other words, don’t try to schnooker people.

On the other hand, if a party makes a clear statement as to what it intended the language to mean during negotiations and the other party does not indicate a contrary intent, the first party’s interpretation will usually be held to attach to the disputed language. Thus, in one case there was discussion and agreement to “do a study and re-evaluation of certain positions” but no discussion of when the results of that study were to be implemented. The employer also made it clear during negotiations that it would not increase the pay of the disputed position and that it had no more money.

The study was done and the union grieved the refusal to implement it during the current CBA term. The arbitrator ruled in favor of the employer ruling that it had agreed to do the study but made it clear that it would not increase the pay. Electrical Radio & Machine Workers Local #93 and State of Iowa, Iowa PERB Case # 09-GA-112 (Jacobs 2009).

In another the employer made it crystal clear that it would agree to the wage rate requested by the union but did not have any additional money and would implement furloughs and layoffs since it had only a certain budget for that unit. The parties agreed to the wage increase and the union grieved the subsequent actions to reduce hours by the employer. The arbitrator ruled in the employer’s favor finding that the parties were well aware of the “deal” once that wage rate was implemented and there was no violation of any other part of the CBA as the result of the furloughs. See, Metropolitan Council and Pipefitters, #455, State of Minnesota BMS file 09-PA-1019 (Jacobs 2009).
Thus, many arbitrators find significant what one party says to the other party, not what they say to themselves. Thus, it is not relevant that the union goes to its membership and tells it something about what has been negotiated nor is it relevant that the negotiation team goes to the governing body and tells them what it believes the language means – it is what they said to the other party that counts.

If no one discussed it during negotiations or simply pulls language out of somewhere else without a great deal of thought about what it says or any ambiguity it might create, arbitrators are forced to fall back onto time honored principles of contract interpretation to assist them in deciding what the language meant and what, ultimately, was the intent of the parties as expressed by the language itself.

This is perhaps the sort of esoteric nonsense that only a first-year contracts professor could love and may well be the reason people began using the arbitration process rather than going to Court in the first place. In either case, it likely does not really matter what one party thought it meant but rather what they said they thought it meant when the language was negotiated. See, below for a discussion of bargaining history.

**PLAIN MEANING – WHATEVER THAT IS**

If words always had one plain meaning, most of us would be out of work. Parties frequently claim that the language is clear but have of course opposite meanings. Imagine that.

It has long been the case that where words have but one reasonable meaning, there is no reason to resort to rules of interpretation since the meaning of the words is conveyed entirely from the language used. In order to resort to the sorts of interpretive tools we will discuss here, one needs to find an ambiguity.

An ambiguity exists where words are susceptible to more than one meaning. See Elkouri 6th Ed at p. 434. One need only look at any standard English dictionary to see the obvious potential for this to occur. Even the word “plain” has several definitions; one connoting “obvious” to one meaning “lackluster or drab.” As you plainly see, no pun intended, mathematics is an exact science; the English language is not.

Ambiguity can be patent, i.e. obvious from the face of the document or latent, i.e. only when viewed in context or when applied to a given situation. See e.g. *Midwest Reclaiming Co.*, 69 LA 198, 199 (Bernstein 1977).

Examples of patent ambiguity can be words like “whenever possible” or “as soon as practical” or “will use best efforts” or “practical and feasible” are so susceptible to differing interpretations that they are difficult to interpret or enforce. In the context of a claim that one side has violated the agreement where the basis for that claim are words like these, the arbitrator will be hard pressed to find a contract violation except the most egregious or truly arbitrary cases. These words are not necessarily ambiguous as much as they are insufficient to fix liability for definitive action.

Latent ambiguity can arise in a variety of contexts that will depend on the facts of each case. In one case where the language provided that “holidays shall be observed and paid for at the straight time rate” the arbitrator ruled that this language did not prevent the employees from getting paid overtime pay for the 9th hour worked on a holiday. See, *Supervalu Stores*, AAA # 471-6 (Bornstein 1997).

In another, language preventing pyramiding overtime did not prevent an employee from getting both overtime pay and weekend bonus pay where he worked overtime on a weekend and was thus covered under two different provisions of the CBA. See, *Cambridge Medical Center and IUOE #70*, FMCS #061220-50874-7 (Jacobs 2006).
In one case the arbitrator ruled that the term “all employees” did not necessarily entitle all part-time employees to full time benefits even though the contract used that term. See, Circle Steel, Inc., 85 LA 738 (Stix 1984) and Univ. of California, 100 LA 530 (Wilcox 1992).

In another case though the arbitrator ruled that under the facts of that case the term “all employees” did include the casual employees for purposes of paying a weekend bonus even though the casuals only typically worked weekends and were part-time employees. See, SEIU Local #113 and St. Francis Regional Medical Center, FMCS case # 060209-53378-7, (Jacobs 2006).

In another case the language provided: “Insurance option for employees not using the family plan after retirement shall be reimbursed by the District for unused sick leave days up to a maximum of $5,000.00.”

The union argued that the language was clear and called for payment of the sick leave benefits if the employee did not use the family plan insurance option after retirement. There were two grievants; one whose spouse also worked for the District and he kept the family insurance and the grievant waived the benefits. The other never had family coverage since her husband had family coverage through his employer. She opted for the single coverage upon retirement.

The District also argued that the language was clear but asserted that this was not what the language was intended to cover. The language provided that if an employee did not opt for the family coverage, they got the benefits. There were no other exclusions and the grievance was sustained. See Greenway Coleraine Schools and Education Minnesota, BMS 08-PA-0243 (Jacobs 2008).

So, it is in those cases where there is true ambiguity that the following rules will apply. They are in no particular order and are used for different purposes at different times but each has a place in assisting the arbitrator to figure out what the parties intended.

**PAROL EVIDENCE RULE**

The parol evidence rule is a rule of law that bars the introduction of any outside evidence that might contradict or supplement the written expression of the parties. It’s what Louis B Mayer said when he noted that an oral contract is not worth the paper it’s written on. In other words, evidence about what somebody said about the contract is not material in determining what the contract actually says. It generally also bars evidence of pre-contract negotiations as evidence of contractual intent.

Under the parol evidence rule, a written instrument intended to be the final and complete agreement of the parties cannot be supplemented or changed by any prior statements either oral or written. The idea is that any prior discussions are superseded by the written document itself and that the written words are the ultimate determiner of contractual intent. The problem of course is what to do in the event those words are ambiguous or even contradictory. As noted above, labor contracts do not generally get set aside under a mutual assent theory but are rather interpreted by arbitrators. Evidence of what the contract was supposed to mean is thus virtually always admissible.

This rule does not apply well to labor agreements. There are multiple exceptions to it. Further, there is always evidence of bargaining history that arbitrators routinely allow as an aid to interpreting labor agreements. As professor St. Antoine notes, “The parol evidence rule should not be intimidating. Almost any credible extrinsic evidence that would help to validate, invalidate or interpret the agreement can be admitted under one or another exception to the rule.” See, St. Antoine, Common Law of the Workplace, 2d Ed, 2005, Section 2.5, page 75-76. See generally, Elkouri, How Arbitration Works, 6th Ed. at p. 440-41.
BARGAINING HISTORY

Elkouri notes that “if there is no evidence to the contrary, disputed contract language will be deemed to have the same meaning as that given it during the negotiations leading up to the agreement.” See, Elkouri and Elkouri, How Arbitration Works, 6th Ed. at p. 453.

A. What did the parties say in negotiations? Bargaining history is still one of the best ways to determine what the parties intended when they negotiated certain language. What the parties say to each other in negotiations can certainly be a guide to contractual intent. If for example, one party suggests a meaning to the other of a contract clause and the other party is silent about it, the presumption could well be that what the first one indicated was what they mutually intended.

In one case, the employer stated during negotiations that it would “reduce work hours of bargaining unit members in order to stay within its budget.” There was clear evidence that the union understood this but did not think the employer would do it since there was so much work to do. When it in fact reduced those hours the employer’s action was upheld. See, Met. Council v Pipefitters, BMS # 09-PA-1019 (Jacobs 2009).

In another, the employer agreed to conduct a wage study to determine the appropriate wage rate for a job classification but there was never any agreement whatsoever as to when the results of that study were to be implemented. The negotiations were long and difficult and the study was the last item for negotiation. The contract clause provided only that the study was to be done prior to the end of the current agreement. It was and it showed that the disputed category was rated at a higher number of points. There was however no language calling for the implementation of the study once it was done. The grievance was denied because there was no such language and because the employer had made it clear in bargaining that it would not grant an increase due to budgetary constraints. union of Electrical Radio & Machine workers Local #93 and State of Iowa, Iowa PERB Case # 09-GA-112 (Jacobs 2009).

Note that the most difficult case is one where the parties intentionally leave a clause somewhat ambiguous and leave it to an arbitrator to figure it out later.

B. Keep track of what issue came up when and what the response to it was. Evidence of who wanted what and when is sometimes critical in determining the intent of the language.

C. Was the language inserted in response to a particular incident or for some specific reason? Was there a change of some sort in the plant, i.e. technological change, change in company focus, change in location of a plant(s) that gave rise to the language? The answers to these questions can be crucial in determining what the parties intended when they insert or change contractual language.

D. Clauses rejected or withdrawn. If a party attempts but fails in contract negotiations to include a specific provision, arbitrators will hesitate, justifiably, to read such a provision into the agreement. This is of course another reason to be very thorough and detailed in what proposals were made by whom and when during the negotiations.

This argument is grounded in the old maxim that a party may not gain in arbitration that which it could not gain in negotiation. Thus, a clause that was proposed and rejected gives a very strong implication that the intent was to reject it.

Also, sometimes a party proposes language that purports to give it greater power or control over a term or condition of employment somewhere else. If that is rejected the party rejecting it might well argue that if the clause already in the contract did not have the meaning it (the rejecting party) thought it did, why then would the first party attempt to insert it. For example, in one case the parties’ contract contained certain scheduling language for many years requiring the company to post a two-week schedule for the employees.
The union argued that the company did not have the right to alter portions of that posted shift without paying premium pay. As partial support for this, the union argued that the company made several proposals in bargaining that would have given the company greater flexibility in scheduling and would have eliminated certain overtime and premium pay requirements. The argument was essentially that these bargaining proposals show that the company must have known that the union’s interpretation of the language was correct, otherwise they would not have sought to change it. See, *IBEW #949 and Hickory Tech Corp.*, FMCS case # 070618-57685-3 (Jacobs 2008). (The grievance was denied on other grounds.

**PRACTICE TIP:** Be careful what you ask for – you might not get it. Parties should be careful not to put something on the table in negotiations, withdraw it and later argue that they had the right to it anyway and the sole reason for putting it on the table was to “clarify it.” That may well signal that the parties understood that you did *not* have it and the fact that it was proposed and later withdrawn strengthens the exact opposite conclusion.

The bottom line is that bargaining history can be a very valuable aid in determining the intent of contract language.

**RULES TO AID INTERPRETATION AND MEANING**

Arbitrators and advocates alike frequently use common law contract interpretation tools to assist in the interpretation of disputed or ambiguous language. These can virtually always be used either in the absence of or to supplement the other sorts of interpretive devices, like bargaining history or practice, to aid in the determination of contractual intent. These are in no particular order of importance or frequency. Their use thus depends on the facts of each case.

**A. What do the clauses modify or affect?**

The Golden Rule, cited in Fowler, *A Dictionary of Modern English Usage* (Fowler Ed., Oxford Univ. Press, 2nd Ed, 1965) is that the words or numbers most nearly related should be placed in the sentence as near to one another as possible, so as to make their mutual relation clearly apparent. See also Elkouri, *How Arbitration Works*, 6th Ed. at p. 441, n. 43.

In one case involving weekend premium pay, the employer argued that the no-pyramiding clause prevented payment of a weekend bonus where certain other premium pay for a double back shift also applied. The problem was that the pyramiding clause was in the overtime section while the weekend bonus and double back shift provisions were in another entirely separate part of the contract. Under those circumstances the pyramiding clause applied only to the payment of “overtime” and did not apply to the bonus and double back shift premium pay, which were dealt with separately in the contract. See, *Cambridge Medical Center and IUOE #70*, FMCS case 061220-50874-7 (Jacobs 2006).

In another case, the language in place to effect teacher layoffs in the event of budget reductions provided in part as follows: “When the District determines that it is necessary to reduce staff, it shall attempt to accomplish the reduction by normal attrition, unless the needs of the District make this impossible or impractical because it is necessary to maintain an existing program.” This was in the preamble to the whole Article.

The specifics of how it was to be done in the event the reduction could *not* be done by normal attrition contained very specific language as follows: “In the event the reduction cannot be accomplished by attrition, it shall be accomplished by the following procedure:

A. Bargaining unit employees with emergency or temporary certification will be reduced first unless needed to maintain an existing program.
B. Regular part time bargaining unit employees and teachers in other areas where only a half time teacher is needed, will be reduced next unless needed to maintain an existing program.

C. Thereafter, bargaining unit employees will be reduced according to seniority.

The language regarding maintenance of an existing program was found not to apply to the more specific language requiring seniority as the determinative factor in effecting a reduction in force. (There was also a very strong bargaining history issue as well. The parties had recently changed the language to delete a provision requiring relative ability and licensure as factors in the layoffs).

Thus, where a clause is within the contract and a determination of what it modifies can be a valuable tool. See also, discussion below regarding specific versus general language, which also applied in this case. See, Central Lee Community School District and Central Lee Educ. Assoc., Iowa PERB case # 08-GA –023 (Jacobs 2008).

B. Giving words their “normal” or a “technical” meaning.

Parties frequently use dictionary definitions of words to show their commonly held or “plain” meaning. This may be helpful but, in some cases, even commonly used words have different definitions and meanings when used in different contexts. Professor St. Antoine notes that, “When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. When an agreement uses technical terms, however, arbitrators give preference to the technical or trade usage, unless there is evidence that the parties intended a nontechnical meaning.” See, The Common Law of the Workplace, St. Antoine, 2d ed. 2005 @ Section 2.6, p. 76. See also Elkouri at p. 450-451.

Thus “shall” typically carries with it the dictionary definition of a mandatory or required action whereas “may,” means permissive or discretionary action. Elkouri cites a case where the term “illness” for purposes of sick leave did not include intoxication since the commonly held usage of the word typically did not carry that meaning. Thus, if a word is one that is used in its commonly held context arbitrators will interpret the word or clause as it is typically used in common society.

Professor St. Antoine gives the example though of what could be termed technical terminology. “Deadheading in the trucking industry means typically empty vehicles whereas in another context it could mean being passed over for promotion. If a term is used in a particular industry, arbitrators will typically apply that term as it is used in that industry unless there is evidence that the parties intended something else.” See, The Common Law of the Workplace, St. Antoine, 2d ed. 2005 @ Section 2.6.

The term “day” or “workday” can have very different meanings. In some industries, the term “day” means midnight to midnight, whereas in others it may be a different 24-hour period. The same could be said for the term “year.” In some industries, a “year may mean a calendar year whereas in others, such as schools, it is a fiscal year running from July 1st to June 30th. “Work week can also have a very different meaning depending on the industry.

Each case is different. Advocates seeking a particular interpretation should therefore be prepared to provide the arbitrator with some context for the disputed language and to show why their interpretation should be adopted.

C. Are the meanings consistent throughout the contract?

One time-honored interpretive tool is that words or phrases are to be given the same meaning throughout the contract unless there is clear evidence to the contrary. Arbitrators frequently use the standards that the contract must be interpreted as a whole and this is one place where that adage is frequently tested.
How is a word or phrase used in other parts of the contract? If they are the same, they may well carry the same meaning. If, however different words are used, the arbitrator may well find that the parties intended a different meaning.

Thus, in a case where the issue was whether overtime was to be paid in a week in which a holiday fell the clause read as follows: “Work performed in excess of 40 hours per week shall be compensated at a rate of one and one-half times the regular rate or compensatory time may be provided if taken within the same week.” The term “work performed” was at issue. Did it mean hours paid as the union argued, or hours where work was actually performed as the employer argued?

Since the parties used the term “work performed” as opposed to “employed” or “hours paid” as they had in other sections, it was clear that the parties intended that only hours where actual work was performed counted toward overtime in that provision. See, SEIU Local #284 and Eden Prairie Schools, State of Minnesota, BMS case # 03-PA-819 (Jacobs 2003).

Thus, if a term is used in one part of the contract it will likely be given the same meaning throughout the contract. Conversely, if a different term is used, the implication is that the parties intended a different meaning.

What about two clauses that are seemingly at odds with each other? Occasionally, two clauses appear to be at odds and mean opposite things. One rule is to look at which clause was inserted later and presume that the latter clause is the one that should hold sway. See, below, however, for discussion of avoidance of forfeiture. Arbitrators will generally strive to find an interpretation that will give some effect to both clauses.

D. Prior Settlements

Sometimes there is evidence that this or a similar issue has arisen before. Evidence of how the parties handled that can be relevant. Obviously too if you do not wish to have the settlement of grievance #1 carry over to the possible grievance #2 on as yet undetermined facts at an undetermined time, you should indicate clearly that the settlement of this is a settlement and that it is done on a non-precedent setting basis.

E. Prior arbitration awards

Obviously one very powerful tool can be prior awards over the same or similar language. These can fall into two categories: 1. Awards over this language between these parties and 2. Awards over similar language either between one of these parties or between two entirely different parties.

The most persuasive of all are those awards between these same parties. Unless something is changed over time, most arbitrators will usually give great weight to a prior award. The party seeking to undermine the effect of the prior award bears a heavy burden of showing either that the award was wrongly decided or that something has changed in the CBA language or in the underlying purpose for it, in technology or plant operations to render it moot.

Awards between these parties can be considered as actual evidence as well as argument and show what the parties intended the language to mean.

Less persuasive but perhaps of some value are awards between one of the parties that involves similar language. Obviously, there may well be differences in the way this language came into the contract and differences in history, concessions by one party that led to it and a whole host of distinguishing features. The argument is that this was how that same language was interpreted by another arbitrator with us and that should be the same here.

Parties sometimes argue that the language in dispute has been used in a particular way in the “industry” and that it is generally accepted. These awards might be of some value in that regard but the question is the intent of these parties in these negotiations over this language.
Awards that deal with similar language, perhaps in the industry, but between two entirely different parties are of limited evidentiary value but may be worth something as argument in support of a particular position. Such awards can be used more as argument/precedent than as evidence of contract meaning.

F. CBA Language must mean something

The general rule is that parties know what their contract says and that each word and clause in it has meaning. Arbitrators generally interpret language so that each clause – even those that appear to be inconsistent with each other to have some meaning.

In one case the employer acknowledged that the language was inconsistent and that to give meaning to one negated the meaning of the other. See, City of Austin, MN and Austin City Employee’s Association, MN BMS # 11-PA 1013 (Jacobs 2013). There the two clauses read as follows:

ARTICLE XI - VACATION

11.1 - Each full-time City employee is entitled to vacation on the following basis: When the date of hire is between January 1st and July 1st, on the following January 1st, credit for two (2) weeks will be given. When the date of hire is between July 1st and October 1st, credit for one (1) week will be given on the following January 1st. When the date of hire is between October 1st and January 1st, credit for two (2) weeks will be given on January 1st, a year later.

11.2 – After one (1) year of service, the employee will receive a total of two (2) weeks vacation and after five (5) years of service the employee will receive a total of (3) weeks vacation and after twelve years of service will receive a total of four (4) weeks vacation and after twenty (20) years of service will receive a total of five (5) weeks vacation and after twenty five (25) years of service will receive six (6) weeks vacation. The extra week of vacation will be added to the employee’s vacation balance on their employment anniversary date.

The grievant’s date of hire was September 8, 2009 and he received one week of vacation as of January 1, 2010, just as the CBA provides at Article 11.1. His one-year anniversary was September 8, 2010 and the union contended that he should have been credited with an additional week of vacation on that date pursuant to the final sentence of Article 11.2.

The City contended that the language was absolutely inconsistent and that the clauses effectively negated each other. Thus, the matter was not substantively arbitrable.

The ruling was that the clauses, while seemingly at odds with each other could be read consistently and to give meaning to each clause. The language of Article 11.1 was interpreted to apply to the “first” adjustment of the new employee’s vacation account. Article 11.2 was interpreted to apply to any additional weeks. The City’s claim that this was not arbitrable due to the inconsistency was rejected based on the discussion in the Mutual Assent section above. See also, Elkouri and Elkouri, How Arbitration Works, 6th Ed. at p. 428.

In one other case, the parties had an old MOU and the employer argued that market forces had changed and that it should be ignored. It was still in effect however and given effect because – after all it was still in effect.
The parties had agreed on language regarding the job duties of a Meter Reader position as follows: “Disconnects/reconnects limited to self-contained meters of 300 volts or less, line-to-line voltage.” Over time the employer wanted others to be able to do this and argued that the arbitrator should not apply this given those changed market conditions and the fact that other employees were now trained to do this work.

The language was given effect because it was jointly negotiated and had been consistently applied for 20 years. More importantly, it is not for an arbitrator to unilaterally change jointly negotiated language. That is the parties’ job to do at the bargaining table.

**G. Expresio exclusio rule - Specifically listing one thing or a set of things excludes others.**

This is the “expresio unius est exclusio” rule that self-absorbed lawyers, mostly young ones who think they can speak Latin, are fond of spouting. What it really means is that if you list something it implies that other things are not on the list. See, Elkouri, 6th Ed at 467-468.

Thus, if the contract or disciplinary policy lists certain grounds for immediate discharge, and is therefore not subject to a progressive disciplinary policy, that implies that anything not on that list is thus not a ground for immediate discharge. So, if the clause provides a specific list of offenses, like theft, intentional destruction of company property, deliberate falsification of company records or assaults, that are subject to immediate discharge and an employee is found to have done something not on that list, the implication is that the offense is not a ground for immediate termination.

**H. Ejusdem generis – of the same kind**

Somewhat closely tied to the prior notion that a specific list encompasses only those items on that list, is the doctrine that when parties follow a list of specific items with a general, catch-all sort of provision, it is assumed that they intended to include only items that are like those specifically listed.

Thus, using the example above, if the language provides for theft, intentional destruction of company property, deliberate falsification of company records or assaults and “other serious offenses,” might not apply to a pattern of more minor offenses, such as absenteeism or tardiness. Obviously, each case will depend on the facts.

**I. Noscitur a sociis - known by association**

This is the notion that words derive meaning from the words around them and that contracts must be read in context to determine the meaning of disputed words. For example, a clause providing for health insurance for “accidents, surgeries and other illnesses” likely does not include routine physicals. Likewise, “physical therapy” is not to be equated with a “pain clinic” as those terms are commonly used and even used by medical professionals.

These will be very fact specific cases and frankly is not used much.

**J. Construing the language against the drafter.**

One of the first things first year law students learn in contracts class is that ambiguous or unclear language is generally construed against the drafter of that language. Thus, if one party proposes language in negotiations arbitrators could use this principle to construe it against that party since they drafted it and presumably had some obligation to explain it or to make sure the other side clearly understood what it would mean.

Not all commentators agree that this principle applies in labor relations. For example, Professors Bornstein and Gosline, note that while this principle may apply in commercial contract interpretation, it does not apply in labor relations:
“[T]he realities of collective bargaining may not be adequately dealt with by interpreting language against its author. Because labor contracts are usually much more of a joint product than commercial contracts, this principle of interpretation should be given a much narrower application in labor arbitration.” See, Bornstein and Gosline, Labor and Employment Arbitration, § 9.04, p. 9-25 (2003).

K. Avoidance of harsh or absurd results or one which is contrary to prevailing law

This theory holds to the view that one should avoid interpreting a contract in such a way as to create an absurd or Catch 22 result. This is sometimes hard to define, as what seems positively idiotic to one party may well seem perfectly reasonable to another.

In one case the employer argued that given casual employees, who were by definition part-time, a weekend bonus where they were not in many cases working many hours during the week, even though the language provided for the bonus for “all employees” was an absurd result. It was a bit odd that they would do that but not so odd or absurd as to create a result that was patently contrary to the clear contract language. SEIU Local #113 and St. Francis Regional Medical Center, FMCS case # 060209-53378-7, (Jacobs 2006).

In a case involving whether a public employee had the right of independent review, the employer’s lawyer argued that for a non-union employee to have a right to gain independent review under the terms of a state statute, the employee would have to be a member of a union. This argument not only bordered on the absurd and specious but also may have actually defined it. See Sampson v City of Babbitt, Minnesota, Court File # A03-380 (MN. Court of Appeals 2003).

Also, any interpretation of the language that is contrary to law is also generally to be avoided. As you can imagine, such results happen rarely and the arguments must be very compelling to get an arbitrator to buy that an interpretation of negotiated contract language would in fact result in illegality.

In one recent case a clause that provided that the contract expired on June 30th but would remain in full force and effect “unless a successor agreement is negotiated” did not mean that the step increases called for in the “expired” contract also expired and would not be paid. Such a result was found to be contrary to PELRA (as well as the parties’ practices).

One example of a harsh or absurd result would be to either create or perpetuate a violation of the CBA by granting one party what it sought in another part of the CBA. See, USPS and NPMHU, JM 1E C 14026357 (Jacobs 2014). There the union sought payment for using career workers instead of using casuals. The problem was that the USPS had hired the casuals in error by hiring them too early and had already laid them off as of the date of the holiday. Granting the relief sought by the union would therefore have been to perpetuate one violation by fixing another.

You can’t have it both ways.

One issue that has arisen in recent years involves inconsistencies between laws. As an example, what to do with marijuana. Some states have legalized its use for either medical or even recreational use but it is still illegal to use under federal law.

This may well come down to the employer’s policy and whether it is allowed for certain use by policy. In one case, the state had legalized the use of marijuana for medical reasons. The employer’s policy had a general prohibition against use or possession on duty and against impairment at work.

The employee was suspected of being under the influence due to a strong odor of marijuana smoke on his clothes. He tested positive for THC and was discharged.
The policy however provided in relevant part as follows: “Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or County operations.”

There was no evidence of impairment and the employee had a medical card by a health care provider to counteract the effects of the drugs he was taking for prostate cancer.

Due to these unique set of facts the employee was reinstated. See, AFSCME #75 and Lane County, OR, (Jacobs 2016). It is important to note however that there was no evidence of impairment, no evidence that the employee was in a safety sensitive position and he clearly fit into the employer’s policy allowing the use of marijuana under certain circumstances.

L. Specific versus general language

The more specific the language the more likely it will be to take precedence over more general language. A general management rights clause will not usually prevail over a specific contract clause pertaining to schedules or other conditions of employment.

Thus, a general management rights clause that provided for the employer to have the right to select and direct the workforce will usually be interpreted in light of more specific language providing for delineated shifts. The parties had general management rights language as well as broad language in the scheduling article that allowed for the company the “right to adjust the standard work week to meet the needs of the business.” There was also very specific language that called for the actual hours of the “standard work week.”

In addition, the parties had a Letter of Understanding that called for “each employee hired prior to June 1, 1998 will be allowed to select either eight (8) hour or ten (10) hour shifts as their standard work week.” In that case the specific language calling for the preservation of the right to select a shift took precedence over the more general language. See, GMP and Progress Castings, FMCS #070608-57415-3, (Jacobs 2008). See also, Elkouri, How Arbitration Works, 6th Ed. at p. 469-72

M. Avoidance of forfeiture

If an agreement or a clause within it is susceptible of two meanings one of which would create a forfeiture and one would not, most arbitrators will select the one that does not. The general rule is that parties are presumed to know their contract and that they did not intend to leave in a clause but negotiate another clause that negates the effect of the first one.

This can also arise in the context of timeliness of grievances. Elkouri notes that if the contract is ambiguous insofar as time limitations are concerned, or as sometimes happens, where the contract contains an “informal” time frame to allow for discussion of grievances, the ambiguity should be resolved in favor of timeliness. Elkouri and Elkouri, How Arbitration Works, 6th Ed. at p. 483.

Arbitrators should however be cautious not to re-write language. If the language is clear and provides for a forfeiture under certain defined circumstances, then the language governs as to the parties’ intentions in that regard.
MANAGEMENT’S RIGHTS

INTRODUCTION AND SCOPE OF THE TOPIC

One of the most frequently used defenses to a claim of contractual violation by a union is that the matter under consideration is a “management right” and thus within the employer’s discretion. Unions on the other hand typically look to the specific provisions of the agreement as limiting the employer’s rights and providing the basis for whatever claim they are making. This topic will examine what those rights are, where they come from and how they may be limited or negotiated away.

This discussion will not however cover the list of mandatory subjects of bargaining defined by the Board or by case law. The question here is what rights are reserved and what rights might be subject to the provisions of the collective bargaining agreement where such a provision exists and how those rights might be impacted by the terms of the agreement. As discussed more here, one will see that generally, most commentators recognize that management retains its right to operate the business in a very broad sense unless “there is a provision in the agreement otherwise” or words to that effect. A review of most of the commentators shows that this caveat prefaces the discussion of whatever subject under examination. Thus, it is for the union to wrest some concession or limitation from the company through bargaining that most if not all contractually guaranteed benefits derive. While there may be some rights that come from past practices, see below, those too must find their source in the CBA or at least with the collective bargaining relationship.

Some state statutes define managerial rights by statute and practitioners should check to see what subjects are explicitly reserved to management and those which may even be prohibited subjects.

The same considerations apply though as in the private sector as between what employers and unions in the arena of management rights. Employers frequently assert that there are inherent inalienable rights versus the union argument that the lines are blurred.

Unions generally do not desire to operate the business, and recognize that somebody must “be the boss,” but assert that when these rights affect the working conditions of the employees or their wages and benefits, unions are entitled to grieve those. The union will also argue, perhaps legitimately, that these rights may not be protected by the claim that the employer’s action is covered by an inherent right to do whatever management wants.

This topic is about that constant push and pull between management asserting that its actions are protected unless there is a specific provision in the CBA versus unions that argue that whenever management’s action affects their interests, a “management rights” argument does not operate to bar the grievance.

Many arbitrators have recognized that CBA’s exist to grant to employees’ rights they do not otherwise have under common law or by statute and that the rights of management are limited only to the degree those rights are limited through the collective bargaining process. While many agreements have management’s right clauses even if the agreements do not contain them arbitrators recognize that those rights are reserved in any event unless they are specifically limited in the agreement or is clearly arbitrary or capricious. See Elkouri the Ed. at page 638-639.

One arbitrator has even remarked that “Where the collective bargaining agreement does not modify or limit management’s prerogatives, management retains the prerogatives of a common law employer. The silence of a collective bargaining agreement upon a subject matter is that management retains its common law rights toward that subject that has not been bargained away.” See Elkouri at 639. See also, St. Louis Symphony Society, 70 LA 475, 481 (Robert 1978).
Some arbitrators impose a standard of reasonableness as an implied term of the agreement and may overturn the employer’s action if it is done in bad faith. Having said that though, unions have a steep burden to show that the employer’s action is arbitrary and capricious. It requires a strong showing of some ulterior or even nefarious motive. See e.g. Elkouri at 728, citing Kennecott Copper Corp., 6 LA 820 (Kleinsorge 1947), employer was denied the right to schedule employees where the sole motivation was to avoid overtime. Note though that management may be allowed to do just that where there is no obligation to provide overtime. Id. at 728 and 741.

What follows is by no means every possible management right but is a list of some of the more common issues that arise.

**MANAGEMENT RIGHTS CLAUSES**

Most CBA’s now contain a management rights clause setting forth broad powers reserved to management. These clauses generally also contain a clause that makes them subject to the specific provisions of the CBA and therein lies the rub, as they say. The question in many cases is whether the subject matter is indeed within the specific provisions of the agreement or not.

It may be too that the matter is covered under a separate provision covering the issue squarely. Obviously, the outcome will depend on the language of these provisions. As noted above, one may not need them per se, but most CBA’s now have them anyway and the question is more often than not whether there is something either in the specific language or in a practice that can be tied to the CBA and which binds the parties to a certain course of action.

In one case however, in addition to the more general management rights clause in a CBA covering bus drivers for a school district, there was also a provision concerning how drivers were assigned routes. That clause provided as follows:

The administration shall determine all hours, starting and stopping time, and the assignment of employees during those hours to insure and maintain the services necessary and essential to the functioning of the school district. The administration shall not act in an arbitrary or capricious manner in doing so and shall notify the union in writing of any significant changes.

The union grieved the assignment of a route to a less senior driver that a more senior driver had had the year before and who wanted that route again. Based on that provision and the general management rights clause that reserved to the District the right to assign, select and direct the workforce in a more general way the grievance was denied on the grounds that the specific provisions of the CBA actually made the management right to assign routes even stronger. There was also no evidence of any arbitrary or capricious action by the school in assigning that route. See Clear Creek Amana Schools and Laborers #566, State of Iowa PERB case # 12-GA-0013 (Jacobs 2012).

The most important consideration in this discussion is whether there is anything in the labor agreement that specifically deals with a subject. Most management rights clauses have language making them subject to the specific provisions of the agreement. Thus, even though the general language may appear to grant to management the right to do virtually anything pertaining to the running of the business or operation, any specific provisions dealing with wages, hours, or other terms of employment will likely trump that more general language.

As a rule of contract construction, more specific language tends to take precedence over more general language. (This is sometimes known as ejusdem generis in Latin and is covered generally in Elkouri at 468-469.) Thus, a general statement in the management rights clause that the company retains all decisions on firing, discipline or demotion for disciplinary reasons is virtually always subject to language requiring just cause.
Likewise, language reserving to management the right to schedule the work force will be subject to a more specific provision establishing the normal work week or hours and for the payment of premium time for working outside these hours. While management may direct employees to work outside of those hours there may well be premium pay owed for that. As always, the language will control and the outcome will depend on that language and the underlying facts of each case.

**OPERATION METHODS**

“Unless restricted by the agreement,” which is a common thread throughout this discussion, arbitrators and courts alike have recognized that management has the right to determine the methods of production, what is to be produced and in what quantities. Many arbitrators and commentators have recognized that management must have discretion as to the method of production and should not be “put in a straightjacket” when it comes to finding what it deems the most efficient means of production or services. See Elkouri at page 664.

Technology changes and changes in employee productivity and training may well necessitate reductions in force or the reassignment of duties to different employees. If there is some restriction against this or limitation on it in the CBA that language will need to be examined and applied by the arbitrator. Absent such language however, the employer is generally free to make these decisions.

In one case, the parties executed a memorandum of understanding, MOU, in the 1980’s limiting the work of certain employees to meters of 300 volts that provided as follows:

[The parties come to] the following agreement and understanding relative to the position of Meter Reader. …

4. This position will do all duties associated with the Meter Reader position, including but not limited to:

   …

   Disconnects/reconnects limited to self-contained meters of 300 volts or less, line-to-line voltage. Employee will receive proper training.

The employer attempted to change this arrangement by having lower paid employees do the connects to meters of 300 volts and provided testimony that the nature of these meters had changed and made them safer to operate due to changes in the way they are designed and in the training that the lower paid workers now received. The union countered with evidence that there were still older meters out there that required more training to connect and that the MOU was still in effect despite its age – it had not “expired.”

The arbitrator sustained the grievance and left it to the parties to negotiate a revision to the MOU or to the CBA itself that could fix the problem. See, *IBEW 949 and People’s Cooperative Service*, State of Minnesota BMS CASE # 10-RA-1645 (Jacobs 2011). See generally, Elkouri at page 663-667.

However, it is generally well established that while the decision to change production methods of technology is within management's right, absent of course some limiting language, the effects of that change on the work schedules, seniority/layoff rights of the employees and the other “effects” of such a decision may well be subject to the grievance procedure and to the CBA. The mere fact that people may lose their jobs over such changes is not controlling; what is rests with whether there is something in the agreement regarding the effects of the change. See Elkouri at page 667.
WAGE CHANGES

As noted above, while changes in operational methods are generally left to management any adjustments in wages as the result may be subject to bargaining or to the grievance procedure, or both as the case may be. These cases will be very fact specific and depend greatly on the nature of the job, what the job description is, what the change is and how significant the change in job duties really is. For example, technological changes happen quite frequently now and the question may be whether the job has now changed so significantly that it should be rated at a higher wage level.

There is some precedent for the notion that management may be allowed to simply create a new wage rate if the job is in fact new. This may be subject though to a CBA provisions requiring negotiation over such a change.

PRODUCTION STANDARDS

Once again, unless there is something that limits this in the CBA, the employer generally gets to decide on the production standards and to enforce them through discipline. Of course, these standards must be reasonable and nondiscriminatory and any discipline meted out as the result of an employee’s failure to meet them will be subject to the just cause provisions of the labor agreement. It is also essential that workers be given adequate notice of the standards and be given the necessary tools equipment and training to meet them in order for discipline to be sustained, but that is another matter.

As with anything pertaining to a CBA though, if there is a provision calling for certain jobs to be performed by certain employees, these will likely trump any general management rights language giving broad discretion to the employer to set production standards.

QUALITY STANDARDS

Management generally reserves the right to set quality standards as well and to enforce the failure to meet these through appropriate discipline. The same sort of caveats and rules set forth immediately above though would still apply. For discipline to stand, the standards must be reasonable, non-discriminatory and well publicized.

The employer shod be able to show that it provided the necessary tools equipment and training to meet the standards and that the standards were not in fact met. Where quality of work is involved, the company must be able to show that it was this particular employee who was failing and not someone else or that there was not some failure in the mechanisms that caused the poor quality. In this regard the right to inspect work is inherent. See, Moorhead Public Service Utility and IBEW, BMS Case # 09-PA-0709 (Jacobs 2009).

TECHNOLOGICAL CHANGES

Technological changes may necessitate considerable change in the work force. Management retains the right to change the technology and to require employees to learn the new technology as long as it provides adequate training to establish any discipline based on the failure to adhere to the new standard.

Where those changes necessitate layoffs or a reduction in force, the decision to reduce the force lies within management's discretion but how this is done is frequently subject to a seniority provision on layoff and recall. How that is done is very fact specific and will depend on the language and the underlying facts.
COMBINING JOBS; TRANSFERS AND JOB ELIMINATIONS

Closely tied to the question of technological changes is the question of the impact of a technological change that necessitates the elimination of an entire job classification. (Are there really any “firemen” left on locomotive engines or keypunch operators?) These again will be fact specific but generally the company has the right to create a new job if there is a need but that decision may be subject to the grievance procedure over any wage rates for that. The company should generally be prepared to show why a new job is needed as opposed to simply placing these new duties into an existing classification especially if the employer seeks to create a new job in a non-union classification.

Elkouri notes that “the impact of a changing technology upon the work force has posed problems to both management and labor not easy of solution. That this issue has been a persistent and vexing one over the years is indicated by the significant number of arbitration proceedings on this subject dating back to the earliest reported decisions.” Elkouri at page 681. Truer words were never spoken.

Most arbitrators hold that without a specific provision restricting this right, the employer is generally allowed to combine jobs or to transfer work to a different classification as long as there is not an excessive workload to the other classification. Employers should be prepared to show why the transfer is necessary and what impact that may have on the work force. As noted below, unions may well object on the grounds that a transfer of job duties or that the combination of jobs may be a subterfuge to undermine the union security clause.

The employer is generally also allowed to transfer duties to individual workers absent anything in the contract governing work within that worker’s classification. Also, seniority and fitness for duty considerations may come into play as well. Employees do not have a “right”: to a particular machine or duties that they prefer. Unless there is a detailed job description for an individual person’s job the employer can assign or transfer duties as long as the workload remains reasonable.

HIRING

The employer retains the right to decide which employees to hire and into what jobs and for the number of hours. The employer also retains the almost absolute right to promulgate polices regarding hiring, subject to statutory anti-discrimination laws, such as rules against hiring spouses or relatives and to set pre-employment standards of education and training or other pre-employment requirements.

Seniority provisions may limit the right of employers to hire if there are employees on layoff or if a current employee is passed over in favor of a new employee. On the other hand, the employer may be able to hire an outside employee if it can be shown that the current employees did not possess the education or training to perform the new job. This determination is really more about whatever seniority provisions exists than a managerial right however. Where there is a seniority or layoff provision those rules will generally be used to determine the propriety of hiring decisions rather than a general management rights clause.

MARKET CONDITIONS

Obviously, market conditions change frequently, but generally do not in and of themselves justify a violation of some other provisions of the labor agreement. Thus, as discussed above, the mere fact that it was more economically feasible and cheaper to have lower paid workers do work that had been previously promised by MOU to higher paid workers, the terms of the agreement prevented it. See, IBEW 949 and People’s Cooperative Service, State of Minnesota BMS CASE # 10-RA-1645 (Jacobs 2011).
While market conditions might well necessitate transfer of work, reductions in force or other decisions, those decision are left to management, subject to seniority of other provisions that limit the otherwise unfettered right to manage the business so as to stay competitive and survive.

SAFETY CONSIDERATIONS

Unions have sometimes challenged decisions to use differing methods of production, reductions in crew size or other decisions on the grounds that there will be a concomitant reduction in safety for the employees. See Elkouri at page 718-720.

Here the question is whether the decision to do what would otherwise be a management right violates a clause dealing with the health and safety of the employees. This will very much depend on the strength of that language and whether it is full of subjective non-committal statements such as “where possible” or “as practicable.”

Elkouri notes that there have been some cases where the employer’s action was struck down on the basis that it created a safety hazard, the vast majority of those cases failed either because there was no clear CBA clause limiting or restricting the employer’s action or that there was an insufficient showing that there was truly a safety hazard. There were other cases in which the grievance was denied on the basis that the job was inherently hazardous and that the change promulgated by management did not create an increase in the normal and inherent hazard of the job.

SCHEDULING

Without a provision governing scheduling this too is left to the discretion of management. Many CBA’s though have provisions setting the “normal” schedule or defining the normal work week. In that case there is a limitation on management’s right to schedule the workers or face whatever claims the employees may have to premium pay for working outside of those hours.

Management can generally change the hours of operation and the start and end times for work shifts. Elkouri notes that many arbitrators speak in terms of management’s right to “schedule the work with a view to optimum efficiency.” Elkouri at page 724. While it may seem that restrictions on this are simply institutional inefficiency, such limitations are not usually without a rational basis. They also address a need to accommodate employee schedules so they can organize their lives around day care, transportation and other scheduling issues.

With these types of changes some arbitrators may impose a rule of reasonableness and require that the employer not act arbitrarily. As noted above, this is a high bar to establish arbitrariness, which generally means more than that it inconveniences the employees. Still, employers should be prepared to discuss why the changes to shift or work week were necessary especially where the schedule is changed for some employees but not all.

OVERTIME

As noted above, an employer may change schedules in some cases to avoid overtime unless there is a provision calling for overtime if the hours are outside of the normal workweek. Generally, this is deemed a management right unless there is evidence that the change was made solely to avoid payment of overtime. Others hold that there is no violation where the employer changed schedules to avoid overtime since there is no contractual guarantee for overtime.

In one case the union argued that the employer’s action to furlough employees and change work schedules to avoid overtime was not permitted under a seniority and general wage clause. The union asserted that in spite of a broad management’s rights clause the seniority clause and the wage provisions compelled the employer to provide full time work at 40 hours per week since there was plenty of work to do.
In that case the employer informed the union during bargaining in very clear terms that they were going to “manage to their budget” and that if the union insisted on getting its wage rate the employer would furlough people, not hire any temporary workers and would not allow overtime requests. The union argued that there was more than enough work to keep people busy and that the employer was acting irresponsibly in delaying projects and other needed maintenance.

The arbitrator ruled that there was no contractual guarantee of overtime and no contractual prohibition against furloughs in this situation and that the employer was clear in what it told the union about managing to the funds it had despite the work that needed to be done. See, Metropolitan Council and Pipefitters #455, State of Minnesota BMS # 09-PA-1019, (Jacobs 2009). The central lesson here is that it is the employer’s prerogative to determine what works needs to be done and when or whether it needs to be done or can be delayed and that budgetary constraints dictate those decisions, not the union, unless there is something in the CBA that governs it.

The employer generally has the right to require overtime when needed, again, unless there is a provision to the contrary or some limit on the amount of overtime in the CBA. There may however be a requirement to give adequate notice of the need for overtime, barring some unforeseen emergency. Refusal to work overtime may well be considered insubordination unless it can be shown that the employer failed to give adequate notice or that it should have simply planned better.

The employer may have some obligation to equalize overtime unless there is a provision allocating it in some other way. If there is a provision that sets forth a procedure for dividing overtime that provision will govern. The employer may have to be “reasonable” in its allocation of overtime though even without a procedure in place. The difficulty comes with clauses such as “as equally as possibly” or “as far as practicable.” Under those provisions the employer has greater discretion and may only be held to an arbitrary or capricious standard in the face of any claim that the overtime was not fairly distributed.

The CBA may contain a clause requiring that certain overtime work be granted to employees on a seniority basis or for those who have signed up for it on a special list. If that work is not assigned in accordance with that provision, there may well be a financial consequence, such as requiring the employer to pay the “lost” overtime to the employees who should have gotten it, or even to those employees who were assigned it, and were paid for it, but who should not have been forced to work overtime.

**SUBCONTRACTING/UNION SECURITY CLAUSES**

This is a touchy subject since subcontracting is seen by unions as a direct assault on the union security clause and engenders very strong opinions on both sides of the labor relations equation. On the one hand the employers assert that it has a responsibility to be as efficient and competitive as possible. In stark juxtaposition to this is the union’s legitimate interest in protecting the job security of its members and the stability of the bargaining unit. Many unions see subcontracting to non-union employees, even those in foreign countries as a direct affront to the very notion of concerted activity and unions in general.

The great weight of authority suggests that in the absence of a provision limiting or prohibiting subcontracting the employer is free to subcontract work to independent contractors if it is done in good faith. Here there seems to be some arbitral authority for the notion that there may be an implicit limitation on subcontracting in the nature of a requirement of good faith. Subcontracting is thus allowed if it is done in good faith and without intent to injure the integrity of the bargaining unit. See generally Elkouri 6th Ed. at page 743 - 746 and cases cited therein.
There is a distinct difference of opinion among arbitrators about the right to subcontract in the absence of a clear provision limiting that right. Some simply hold that that management has that right even under a general management rights clause. See e.g. Custom Industries, 115 LA 1625 (Pratte 2001).

Others hold that management can subcontract if it does so reasonably and in good faith. These do not require any specific reference to the recognition clause but rather appear to focus to the business need for the subcontracting even though it may have a deleterious effect on the bargaining unit. See e.g. Libbey Glass, 116 LA 182 (Ruben 2000).

Others point to the recognition clause, seniority and even wage clauses of the contract and imply a limit on the right to subcontract even in the face of a broad management rights clause. These clauses imply a standard of reasonableness and good faith as well but focus on the notion that it is manifestly unfair to allow the parties to agree to a contract with these clauses in them and then allow the employer to simply subvert all of them by contracting out the very work assumed to be done by bargaining unit members at least as long as that work was available. See, A.D. Julliard, Co. 21 LA 724 (Hogan 1953). Elkouri at 746.

Perhaps the best summary of this is that the interests of the employer to operate the business most efficiently must be balanced against the legitimate interests of the union in preserving the bargaining unit. In general, in the absence of a provision in the contract, the employer may be allowed to subcontract as long as it done in good faith and as long as it does not seriously weaken the bargaining unit.

Elkouri posits a series of factors that can be considered as follows: Note that these are not controlling individually but are factors that many arbitrators use to determine if subcontracting is allowed where there is no other contractual provision other than management rights clause.

Past practice - has the employer subcontracted out in the past? If so, it is much more likely to be allowed now.

Justification – is the subcontracting done for sounds business reasons – cost containment, safety, augmenting rather than subverting the work force, plant security (subcontracting security personnel), to meet a short-term emergency need? If the employer can demonstrate that the subcontracting is done for sound and legitimate business reasons, as opposed to some ulterior motive to subvert the unit, it is more likely to be allowed as reasonable and in good faith.

Effect on the bargaining unit – this is the corollary of the preceding paragraph; if there is evidence that the subcontracting is done to discriminate against the union it is far less likely to be allowed.

Effect on unit employees – will they be displaced as the result of the subcontracting? Subcontracting may well be justified even though unit jobs are lost but this is a factor. Sometimes, the union will claim that overtime is lost as the result but this is a less important factor unless there is a contractual guarantee of overtime in the first place.

Type of work – is this work that is normally done by unit employees? If not, the subcontracting is more likely to be allowed.

Are there enough qualified employees in the unit – if not the subcontracting is more likely to be allowed.

Availability of equipment or tools to get the work done – if not it is more likely that the subcontracting will be allowed.
Regularity and duration of subcontracting – how often has it happened and how long will it last? The longer it is anticipated the more likely it will be considered permanent and the greater the possibility it will be overturned or limited. See also, International Paper Co, 319 NLRB 1253, 151 LRRM 1033 (1995). (The NLRB has held that if the subcontracting is inherently destructive to the bargaining unit it may be overturned as a violation of the employee’s Section 7 rights. In that case the DC Circuit applied the doctrine, but found that in that case it was not “inherently destructive.” See 115 F.3d 1045, 155 LRRM 2641 (DC Cir. 1997).

Is there an emergency need that justifies the subcontracting?

History of negotiations on the question of subcontracting – has the union unsuccessfully attempted to insert a contract clause on subcontracting.

ASSIGNING WORK OUT OF THE UNIT

Much the same sort of case-by-case analysis is used in the situation where work is assigned to workers outside the bargaining unit. Once again, without a provision prohibiting it this may be allowed.

Other arbitrators use several factors to determine if this is reasonable or not. These are as follows:

The quantity of work to be assigned – is the quantity of work assigned de minimus or will it adversely affect the integrity of the unit?

Is the work supervisory or managerial in nature?

Is the assignment for a special need or for a short time?

Has work been assigned out of the unit in the past?

How clear is it that this work is truly “bargaining unit” work?

Was the assignment occasioned by a new technology or advancement in the process by which the work is done?

Is there some special situation or emergency?

How strong is the recognition clause and seniority clause? Do they act as a prohibition or limitation on the right to assign the work?

In one case the parties had a clause regarding outsourcing of work that read as follows:

The mission of the Alliance is to provide industry leading health care and to create an environment where employees flourish, there are opportunities for advancement and growth, and our resources are used in the most cost-efficient manner. The success of this Alliance is dependent upon a trusting relationship where we can engage in frank, open and honest discussions in an atmosphere of mutual respect. Our ability to be innovative and progressive in achieving results is also critical to our success.

Strategic Alliance bargaining work will not be outsourced except in extraordinary circumstances. When Allina believes that bargaining unit work should be outsourced, and there are reasons to outsource, Allina will notify the union, in writing, of the desire to meet and discuss outsourcing of specific work. If the union wishes to initiate consideration of insourcing of certain outsourced work, it will notify Allina, in writing, of the reason to insource specific work and the desire to meet and discuss the same. When considering insourcing and outsourcing, the Strategic Alliance Agreement principles will be considered as part of the analysis.
The parties had an unusual agreement in that it was designed to foster a greater level of industrial cooperation than might be present in the “usual” CBA. They had a series of principles that set forth this unusual cooperative relationship that was designed to foster cooperation rather than the more arm’s length sorts of relationships in more usual labor management relationships.

The employer cited the outsourcing provision as allowing the outsourcing of the entire courier department within the employer, some 23 employees. The union asserted that the decision to outsource the entire department was not only inherently destructive to the unit it was not in keeping with the principles underlying the agreement. There was also not a strong management rights clause in the agreement.

The arbitrator ruled that the decision to outsource was prohibited by the Agreement in light of the factors set forth above; most important of which was that the entire department would have been eliminated and replaced with lower paid, non-union outside employees. There was also some evidence that the cost savings asserted by the employer may not have been achieved and that there may have been greater inefficiency since the outside couriers did not know the employer’s business as well and would have had a steep learning curve at best thus creating a potential of endangering patient safety.

**WORK RULES**

It is well established that the employer may unilaterally establish reasonable work rules pertaining to the on-duty conduct of the employees. It may also promulgate off duty conduct rules but there the employer must be able to show a nexus between the off-duty conduct and the work in order to have them enforced.

In most cases the right to establish the rule is not contested, although some unions argue that the rules themselves must be reasonable on their face. It is through the effort to enforce them by disciplining employees for failure to adhere to them that the challenges arise, usually through the just cause requirement. The reasonableness requirement is thus not usually raised in response to the rule itself but rather to the application of the rule in particular situations.

Thus, if an employer attempts to promulgate a no-smoking policy it can do it on virtually any basis – i.e. health and safety, compliance with state law or in response to employee or customer complaints about smoking.

Zero tolerance policies are particularly vulnerable to these sorts of challenge from unions which argue that unilateral policies are always subject to the just cause requirements, one of which is generally that the rule and its application must be reasonable. For example, a rule may state that discharge is automatic for a given offense but an arbitrator is free to fashion a remedy less than that if that is reasonable under the circumstances. (Employers should be wary of rules that state that there is a zero-tolerance policy with a consequence of “up to” discharge. In that event, discharge does not seem automatic, but that is an application of the rule itself not a response to the right to promulgate it.)

For example, a rule requiring the use of safety glasses throughout the plant was held to be unreasonable as it applied to wearing them in the lunch room. See, *Bauer Bros. Co.*, 48 LA 463 (Kates 1967). Rules requiring the use of seat belts at all times including in the yard where travel is restricted to 10 MPH though may well be upheld. These cases are very fact specific and will greatly depend on the underlying facts, the grievant’s conduct and record and the rule under consideration.

**DRUG AND ALCOHOL POLICIES**

This has been the subject of much debate within the labor relations community and may depend on state or federal law and whether the employees are working in a safety sensitive job, such as oil refineries, public transportation, electric utilities or pipelines as examples.
Once again, the employer is generally allowed to promulgate the policy but it is in the enforcement that the challenge to the rule’s reasonableness will be raised. Rules pertaining to reasonable suspicion testing have been upheld more often especially if there is a defined set of circumstances giving rise to the reasonable suspicion. See Elkouri at page 777-778.

Random drug testing has been upheld but there is generally more scrutiny of those types of testing programs to determine their reasonableness and relatedness to the work and require that the employer show a compelling reason for random drug testing in the face of a just cause requirement. Elkouri at 1006-1007.

In the public sector there may even be 4th Amendment considerations and some courts have overturned random drug testing policies for public sector employees. See, Treasury Employees v Von Raab, 489 US 656 (1989). The Court held that unless a public employer can show a compelling reason for random testing, such as safety sensitive positions, the random test may constitute an unreasonable search and seizure.

Thus, the employer may promulgate a rule for either reasonable suspicion or random testing but may face a challenge to the rule through its application through the just cause provision of the labor agreement.

CELL PHONE POLICIES

Many employers now have strict rules against the use of cell phones while on duty or while operating certain pieces of equipment. The railroads, in response to several recent tragedies have strictly forbidden use of any cell phones while on duty. Some even prohibit it while walking on railroad property while using a cell phone or other handheld device because of the risk of injury or accident.

Public transit agencies now have rules prohibiting the use of cell phones at all and will require that they be off and stowed while the driver is operating the bus or rail car. Others even forbid them from even being on the driver’s person while operating a bus or railcar and will impose severe discipline or discharge for even a first offense. Many of these have been upheld due to the safety sensitive nature of the work and of the severe consequences of distracted driving.

NO SMOKING POLICIES

Elkouri notes that most arbitrators uphold restrictions on smoking both inside and outside the employer’s plant or operation, as long as the conduct is still on the employer’s premises. Thus, a rule against smoking within a certain number of feet from the entrance will generally be upheld.

If, however there is a past practice and a designated area for smokers the employer may not be allowed to ban smoking anywhere in the plant. Thus, where there was bargaining history pertaining to smoking rules and designated areas, a unilateral rule against smoking anywhere did not survive arbitral review. See, Elkouri at 1020.

Generally, though if there is no bargaining history and no other provision pertaining to smoking an employer retains broad latitude to restrict or ban smoking on its premises.

ATTENDANCE POLICIES

Management of course has the right to establish reasonable rules pertaining to attendance and to enforce those rules through discipline. It is again in the enforcement of those rules that the challenges arise. Many arbitrators hold that an employer may not disregard sick leave days to which the employees are contractually entitled or if the employer seeks to treat all absences equally, irrespective of the reasons why the employee is out. Attempts to discipline employees where this is shown, may be struck down or discipline overturned in appropriate circumstances.
Some employers have so-called no fault policies allowing automatic termination after the employee has accumulated a certain number of “points” or “occurrences” for absences. There is a disagreement among arbitrators over whether these polices are reasonable where they are unilaterally established or whether they are still subject to the just cause standard. (It should be noted that a negotiated no fault attendance policy will carry far greater weight and is much more likely to be considered to be reasonable than one that is unilaterally established.)

Some arbitrators note that no-fault policies and just cause standards are inconsistent with each other and that just cause must therefore always be used. Thus, the number of points accumulated under the no-fault attendance policy is only one piece of evidence to be considered as opposed to an automatic imposition of discipline irrespective of any other factors. See Elkouri at page 778.

If there is an agreed upon disciplinary matrix tied to attendance and “points,” the discretion normally granted to arbitrators in fashioning a remedy or mitigating discipline is limited. That of course depends on the language of the clause itself.

As always, the facts of any given situation will govern; as most arbitrators will tell you, it depends.
SENIORITY CLAUSES

Seniority is a creature of contract. The initial inquiry must of course focus on the contract language itself. Seniority may manifest itself in a number of ways, in terms of transfers, promotions or wages but typically the disputes center over a promotional opportunity where a junior person has been awarded an open job to the exclusion of a more senior worker.

Elkouri provides guidance in this discussion as follows:

“There are two basic types of seniority provisions. The more rigid type requires the recognition of strict seniority – that is, the employer must give preference to the employee with the longest continuous service without regard to any other considerations. … The more usual provision, however, is written so as to serve the basic aims of seniority, while recognizing other factors, especially the relative ‘fitness and ability’ of the employees, in determining preferences in employment. Such factors may include skill, ability, aptitude, competence, efficiency, training, physical fitness, judgment, experience, initiative and leadership. In regard to this ‘modified seniority,’ one arbitrator stated:

Generally speaking, such modified seniority is acceptable to most unions and employers because it acknowledges the fact that wide differences in ability and capacity to perform the work required exists between employees in a plant and that such differences are a logical and legitimate consideration in determining preference in employment especially in making promotions and demotions as well as reduction of forces. (Citing, Darin and Armstrong, 13 LA 843, 8450846 (Platt 1950).

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Modified seniority clauses fall into one of three basic categories: ‘relative ability’ clauses, ‘sufficient ability clauses,’ and ‘hybrid’ clauses. …

Relative Ability Clauses

The first category contains those clauses that provide in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. This type of clause might be termed a ‘relative ability’ clause, because here comparisons between qualifications of employees bidding for the job are necessary and proper, and seniority becomes a determining factor only if the qualifications of the bidders are equal. (Citations omitted).

The wording of these relative ability clauses varies. … [T]he phrase, ‘relative ability’ is not interpreted to mean ‘exactness or absolute equality;’ an ‘approximate or near equality’ is sufficient.’ … Sometimes the standard is expressed as the ‘head and shoulders rule,’ that is the successful bidder is ‘head and shoulders’ above the unsuccessful candidate in ability.

Sufficient Ability Clauses

The second basic type of modified seniority clause provides in general that the senior employee will be given preference if he or she possess sufficient ability to perform the job. Minimum qualifications are enough under these sufficient ability clauses. This type of clause may state that preference will be given to the senior qualified bidder, for to the senior employee, provided he or she is qualified or has the ‘necessary’ ability for the job. Under this type of provision, ‘it is necessary to determine only whether the employee with greater seniority can in fact do the job.’ Comparisons between applicants are unnecessary and improper, and the job must be given to the senior if he is competent, regardless of how much more competent some other bidder may be.’ (Citations omitted).
Hybrid Clauses

The third basic type of modified seniority provision, which may be called a ‘hybrid’ clause, requires a consideration and comparison in the first instance of both seniority and relative ability. The hybrid clause is typically worded in such general terms as ‘seniority and qualifications shall govern,’ or ‘due consideration shall be given to length of service, aptitude and ability,’ … without indicating the relative weight to be accorded these factors.” See Elkouri and Elkouri, How Arbitration Works, 8th Ed BNA books at Section 14.7.A.

Professor St, Antoine in The Common Law of the Workplace, 2nd Ed, BNA Books, also describes these types of “modified seniority clauses” similarly as follows:

“Strict seniority clauses require job preference decisions to be based solely on seniority rankings. Sufficient ability clauses require that the job preference be given to the senior employee who possesses sufficient ability to do the job. Relative ability clauses require that the job preference be given to the senior employee where the qualifications of the senior and junior employee’s abilities are relatively equal.” See, Section 5.9.

He goes on to observe that “when the agreement does not set forth the methods or factors to be applied in determining ability, those considered by the employer must fairly and nondiscriminatory relate to job requirement and the employee’s ability to meet job requirements.” Id.

There is some disagreement among the commentators as to which party carries the burden of proof in such cases, Professor St. Antoine noted that “in relative ability” cases employers are often required to show why a junior employee is abler than the bypassed senior employee. … However, in some cases the arbitrator may impose the burden on the union to show that the employer’s determination of ability was wrong based on discriminatory, arbitrary or capricious considerations.” Id. See also Elkouri, 8th Ed at 14.7.C, where the authors observe that cases essentially go both ways in determining which party has the burden of proof in a relative ability clause.

PAST PRACTICE

Is the faintest ink more powerful than the strongest memory? This discussion will thus focus on whether something is a binding past practice as opposed to a happenstance event that has no particular evidentiary or contractual significance and therefore does not bind the parties to doing it that way in the future.

A very wise older arbitrator once said that past practice is perhaps the most used and most abused concept in all of labor relations. He analogized it to the union arguing that past practice was like the sun coming up in the morning. It has always come up like that in the past and there is nothing to lead anyone to believe that it won’t keep doing that forever. The employer, however out argued that it was like lightning striking. Sure, it happened once this way but only because certain innumerable factors came together in the cosmos to create a confluence of factors so unique, they will never happen again. Past practice, he pointed out is somewhere in between these two scenarios.

No discussion about how to interpret contract language would be complete without at least some reference to custom and usage and past practice. The scope of this discussion will not allow for an exhaustive study of past practice however, as that is a much longer and more in-depth analysis. Suffice it to say that perhaps the best measure of how parties intend language to be interpreted is by how they actually have interpreted and used it.
Elkouri notes, “Unquestionably, the custom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past practice may be introduced for any of the following purposes: … to indicate the proper interpretation of contract language.” Elkouri at p. 605. There are certainly other uses for past practice including that clear language has been essentially re-written through the usage and practice of the parties. Here though, the inquiry will be limited to interpreting ambiguous language in the agreement.

There is still a division of opinion amongst arbitrators and commentators on whether truly clear language can be re-written through the use of past practice. Some argue that the written word is sacrosanct and may not be changed except by negotiation at the bargaining table. Others however argue that the labor contract is a living document that can and frequently is altered to meet changing times and needs of employers and employees or technological or other economic conditions.

A. WHAT IS A PAST PRACTICE AND WHAT DO YOU DO WITH IT?

WHAT IS IT?

Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. See Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).

Elkouri states it in slightly different terms as follows: In the absence of a written agreement, ‘past practice,’ to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.” Elkouri at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement.

Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does NOT mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future.

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WHAT IT ISN’T

ONE TIME EVENTS: One-time events or events that have no particular binding significance are not usually considered a past practice.

FAILURE TO GRIEV: The mere failure to grieve things may not count as a binding past practice (but may be evidence of contractual intent). Elkouri notes as follows: “the non-exercise of a right does not amount to a ‘negative past practice’ and thus become a forfeiture of it once changed. Arbitrators consistently hold that even if a party has not done so in the past, the party retains the right to police the agreement at any point.” Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 239-240.
Elkouri also noted as follows: A related rule is that a party’s failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. See also, Elkouri, 5th Ed at page 652.

UNILATERAL PRACTICES: Obviously, a unilateral practice, even one that has gone on for years, is not binding on the other party unless there is evidence that the other party knew of it and accepted it as a part of the labor agreement, or at least as a part of the labor relations culture within a bargaining unit. See Elkouri 5th Ed at page 633, n. 14 and cases cited therein.

MANAGERIAL DISCRETION: Exercises of managerial discretion, even if longstanding and consistent may not be a binding past practice. Thus, the fact that management has always granted vacation requests in light of a clause that makes it discretionary with the employer 1000 times in the past does not require that it be granted on the 1001st.

Examples of employer discretion lack any sense of mutuality and are also generally not considered binding. See Elkouri 6th Ed. at p. 636 citing Ford Motor Co., 19 LA 237, 241 (Shulman 1952) infra.

WHAT CAN YOU DO WITH IT?

Elkouri has suggested that past practice can be used for at least three major purposes. Elkouri provides as follows:

Unquestionably, the custom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language; or (3) to support allegations that the “clear language” of the written contract has been amended by mutual agreement to express the intention of the parties to make their written language consistent with what they regularly do in practice in the administration of their labor agreement. Elkouri & Elkouri, How Arbitration Works, Chap. 12, p. 605 (6th Ed. 2003).

There are some cases too where the language is intentionally left ambiguous because the parties cannot agree to anything better and want to get the CBA signed. It is then left to an arbitrator to figure it out. Practice can be very helpful in this regard.

“Under certain circumstances custom and practice may be held enforceable through arbitration as being in essence a part of the parties’ ‘whole’ agreement.” Elkouri and Elkouri, How Arbitration Works, 5th Ed. p. 630.

Elkouri cites to several arbitrations that have upheld the principle that the words on paper do not always constitute the entire story when trying to determine the parties’ intent. The U.S. Supreme Court in one of the famous Trilogy cases held as follows: The arbitrator’s source of law is not confined to the express provisions of the contract, as in the common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it. See, U.S. Steelworkers v Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S. Crt. 1347, 1351-52, 46 LRRM 2416, 2419 (1960).
Elkouri further notes as follows:

Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitely McCoy: But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking the contracts which the parties themselves made. The mere failure of the company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non-use of a right does not entail a loss of it.” Elkouri and Elkouri, How Arbitration Works, 5th Ed. at P. 635.

**CAN PAST PRACTICE BE USED EVEN WHERE THERE IS CLEAR CONTRACT LANGUAGE?**

Note that there is always considerable argument in a case involving past practice as to whether a practice can be used at all to redefine clear contractual terms. There is no definitive answer to this question. Some arbitrators will disallow past practice in the face of what they find to be clear and unambiguous contract language while others will find that strong evidence of practice, if it meets the tests discussed below, can be used to determine intent even in the face of clear contract language.

Perhaps the best-known case in Minnesota was *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties’ practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated.

The County argued that the clear language of the contract, and it was, indicated that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The County also argued that the so-called zipper clause made the past practice argument moot. This clause, it was argued prohibited the use of any practice or matter outside of the present collective bargaining agreement form being considered. It was supposed, the County claimed, to prevent the very argument being made by the union in that matter. (See below for a general discussion of zipper versus maintenance of benefits clauses.)

Despite that, the arbitrator ruled in favor of the employees because the practice, even though different from the clear language, met the tests for a binding past practice. The Minnesota Supreme Court held as follows:

“Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).
Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears thus pretty clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in Ramsey County.

It should be noted however, that there is a reluctance of many arbitrators to overturn or alter what appears to be clear contract language. Not all arbitrators are so quick to allow evidence of past practice much less to use it to overturn clear contract language to the contrary. Elkouri, cites to Arbitrator Whitley McCoy as follows:

“… caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a company over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non-use of a right does not entail the loss of it. See Elkouri at 635, citing to Esso Standard Oil, 16 LA 73 (McCoy 1951).

The eminent Arbitrator Harry Shulman also observed the need for caution and noted as follows:

“There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases, there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri 6th Ed. at p. 636 citing to Ford Motor Co., 19 LA 237, 241 (1952).

Some of these cases are now getting old but their principles remain relevant. Past practice, while it may be used to provide clarity to unclear language or to supplant the agreement where it is silent, there are limitations to its use and its effect.

In one case the employer argued that past practice superseded clear contract language regarding the probationary period for new hires. The contract clause was clear and required that all new employees serve a 6-month probationary period. For years, the employer had applied this in a somewhat loose way and pro-rated the probationary period depending on the FTE the employee was hired for. Thus, for example, if an employee was 0.50 FTE, their period was extended to a year. A 0.80 FTE was 9 months and so forth.

The union provided evidence that they never knew this was going on and would not have because the employees never told them that and were under the impression that they had no grievance rights until their probation had passed. Those who failed probation had never filed a grievance over that before.

In the case at hand, one employee who had been hired at 0.50 FTE but who had been there for more than a year was fired for various reasons. (Her period had been extended due to several medical leaves of absence, which also complicated the case somewhat but the issue was whether the clear CBA language prevailed over the practice to the contrary). The union argued that despite the practice, they never agreed to it, were never aware of it and thus there was no acceptability or mutuality as required by the elements of a practice. The union relied on the clear CBA language. The arbitrator agreed on those facts given the lack of any evidence that the union was ever aware this was going on. See AFSCME and Wright County, Minnesota MN BMS 09-PA-0933 (Jacobs 2009)
ELEMENTS OF A PAST PRACTICE - HOW DOES ONE PROVE THAT IT EXISTS?

The Court in Ramsey County noted that certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3. Elkouri states it in slightly different terms as follows: In the absence of a written agreement, ‘past practice,’ to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.” Elkouri at 632 citing to Celanese Corp. of America, 24 LA 168 (Justin 1954).

CLARITY AND CONSISTENCY – UNEQUIVOCAL - Thus while there is some disparity in definition, the basic concepts remain the same. It is clear that the practice must be clear and consistent, i.e. unequivocal. Obviously if the practice itself has varied over time this fact would seriously undercut the argument that there exists a binding past practice. In Ramsey County for example, it was shown that the vacation accrual rates had been different from the contractually provide rates for years.

LONGEVITY AND REPETITION

Evidence that the practice has gone on for a long period of time is essential. Obviously, if a practice occurs only once such facts would undercut the claim that this was the mutually accepted way of doing things in the future. While a practice may well become binding even if it occurs only once this would certainly be an argument that would hurt the claim. Certainly, a past practice should be “readily ascertainable over a reasonable period of time.” This would strongly imply that it should occur multiple times as a prerequisite for it to be binding.

ACCEPTABILITY

How acceptable a practice is will depend on the facts and whether an arbitrator feels that the parties have come to accept this as the way they must continue to address a recurring situation. This, along with the discussion of the “underlying circumstances” will be very fact-dependent.

Generally, evidence that the parties operate under the practice with the full knowledge of the other party is very beneficial to the party seeking to enforce the practice. Each case will be different but the longer one can prove the practice has existed and the stronger the evidence is that the parties all knew it existed, despite possible language to the contrary or without language at all, the better.

ZIPPER CLAUSES VS. MAINTENANCE OF BENEFIT CLAUSES

A zipper clause, or entire agreement clause, as they are sometimes known, generally forecloses a prior practices or agreements and states that the entire agreement is contained in the written agreement. As noted above, there have been cases that have found ways around them, See, Ramsey County, supra but unless there is evidence to suggest that something has changed, they are frequently used to deny the application of a past practice. See discussion of reserved rights theory above.

Note though that they foreclose only practices that existed prior to the execution of the current agreement. In one case a City had a practice of allowing dispatchers to leave the premises for lunch. When they built a new city hall the City directed that this practice be discontinued. The parties negotiated over this item and eventually went to interest arbitration over this, along with other issues. The arbitrator awarded the City’s position and further inserted a zipper clause into the agreement.

Note too that zipper clauses “do not negate practices that are relied upon for the purpose of casting light on ambiguous contract language.” Elkouri, How Arbitration Works BNA Books 6th Ed. (2007) at page 621. This is perhaps the most widely used way around such a clause – by arguing that the contract provision is ambiguous and that a practice is necessary to determine contractual intent.
Maintenance of benefits clauses do almost the opposite. They preserve any practices that existed prior to the contract and call for them to stay in place or at least be maintained at whatever levels they were at the commencement of the labor agreement. Elkouri notes that under such clauses the question often arises as to which practices or local working conditions are to be preserved. … General catch-all provisions, designed to freeze general working conditions, have been held to be ineffective to nullify an express provision of the contract. See, generally, Elkouri, *How Arbitration Works*, 6th Ed. BNA Books (2007) at pages 620-623. See discussion of implied obligation above.

**PAST PRACTICE SUBJECT TO REASONABLE REGULATIONS:**

Arbitrators have held that a practice may be binding but is still subject to reasonable regulations to prevent its abuse. Elkouri notes that the mere fact that a benefit has been established by a past practice does not necessarily mean that all arrangements by which it has been provided are frozen forever. In cases where the practice was established to provide for parking for employees the company was allowed to provide substitute facilities for that purpose. Elkouri 6th Ed at p. 642. Thus, even practices that have been established are subject to some regulation and may be altered as circumstances warrant.

**ONCE THERE IS A PRACTICE ESTABLISHED, CAN IT EVER BE CHANGED?**

Short answer: yes. A practice can be altered or even terminated in several ways as follows:

**PAST PRACTICE CHANGED WHERE THE UNDERLYING REASON FOR THE PRACTICE HAS CHANGED**

Elkouri also notes that practices may be changed or even eliminated where the underlying basis for the practice has changed over time. The “rule” was stated as follows: “It must be stated as a general proposition that, absent language in the collective bargaining agreement expressly or impliedly to the contrary, once the conditions upon which a past practice has been based are changed or eliminated, the practice may no longer be given effect.” See, *Gulf Oil Co.*, 34 LA 99 (Cahn 1959).

The operative language in the statement of the rule is “absent language in the collective bargaining agreement.” We are talking about practices that draw their essence from the collective bargaining agreement but are not actually found expressly or impliedly in it. These situations will again be very fact specific but the commentators seem to agree that where a practice has grown up over time in response to a given set of problems or circumstances, the practice may be altered where those underlying conditions are changed. Elkouri notes the example of a plant that gave 10 minutes of overtime to allow painters to clean their tools being changed where management fixed the congestion problem that had created the need for the additional time in the first place. Elkouri at p 643.

**REPUDIATION OF PAST PRACTICE DURING NEGOTIATIONS**

Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations. Past practices are part of the CBA and may be eliminated or modified by one party giving the other notice of intent to terminate the practice at the end of the current CBA. The weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice is subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract.

This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.
Professor/Arbitrator Mittenthal states as follows: Consider first a practice that is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For … if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties’ acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.” Elkouri, at p. 643-44, Citing Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, proceedings of the 14th Annual Meeting of the NAA.

See also, SEIU Local 284 and ISD 272, Eden Prairie Schools, BMS CASE # 03-PA-819 (Jacobs 2003). There the parties had an admitted past practice of paying overtime during weeks in which the employees were paid for holidays and vacation etc. and where they were paid for more than 40 hours. The contract language was quite clear and was to the contrary of how the actual practice had been operating. Without more, this would likely have been a situation like Ramsey County, where the past practice would have prevailed over the contract language, despite its apparent clarity. The contract language in question as well as the practice had existed over the course of several negotiation periods. The practice was to pay overtime for hours paid versus hours actually worked in a week where a paid holiday such as Labor Day fell and where the employees were called in to work additional hours. There were thus weeks in which the employees had been paid for more than 40 hours due to the paid holiday but actually worked less than 40 hours.

During negotiations, the District sent a letter to the union advising it of the intent to terminate the practice of paying overtime in those weeks where a holiday or other paid time off fell. The union took the position that the practice would continue after the contract unless there was a change in the contract language. No change was made to the existing contract language despite the notice from the District that it would discontinue the practice of paying overtime as set forth above upon the signing of the new agreement.

Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on these facts. See also, National Tea Company, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue ad infinitum, but may be repudiated by either party through timely and proper notice on intent to do so before or during negotiations.

In Gillette Company, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in Eden Prairie Schools. There he found that management had fulfilled its obligation to put the union on notice of the intention not to continue a practice that had been in existence for several years during negotiations for the next labor agreement. The union thus had the obligation to bring this up in negotiations and place language regarding the practice into the agreement. The union did not do that and instead chose not to address the matter at all, arguing later that the practice continued unless there was a change in the contract language.
The arbitrator found that the exact opposite was the case and held that the company had successfully repudiated the practice. “Once placed on notice of the timely repudiation of the practice, the obligation switched to the union to bargain over this subject at the next round of negotiations. Yet this was not accomplished, and consequently the ‘practice’ was properly eliminated by Management.” Gillette Company at p 4 of the opinion. See accord, Copaz Co and UFCW Local 7A, 1993 W.L. 790196 (Traynor 1993).

In City of Blaine and LELS, MN BMS 15-PA-0671 (Jacobs 2016) there was a practice regarding contribution to an employee cafeteria plan. The language provided for a monthly contribution for that purpose. There was a longstanding and well accepted practice whereby employees could opt out of single coverage, since many had coverage through their spouse. If they did so the city would then provide the stated amount in the CBA less the cost of single coverage plus $50.00 per month. The $50.00 was simply added to the employees’ paychecks.

There was no question that this practice was a binding past practice and the union filed a grievance to have the entire amount paid to the employee but withdrew it in the face of a clear practice.

The union then sent a notice seeking to repudiate the practice during negotiations for a successor agreement. The city responded by telling the union that it would need to negotiate different language – since there was no language at all calling for the payment of the $50.00.

No changes were made in the language and the practice continued. The union then filed another grievance claiming that the practice had been repudiated and argued that the employees should be paid the entire amount of the contribution even though they had opted out of single coverage.

The grievance was denied again, based on the lack of any change in the language. The contractual language was in that case ambiguous – in fact it was silent on the practice and the practice was necessary to “give meaning” to the contractual language. In that case the practice actually added something to the language.

In that case, the union sought to change the practice but was unable to negotiate different language calling for the employees to get the full amount of the contribution even though they opted out of coverage. There was further some evidence that the union actually tried to do that in negotiations but agreed to drop that request in exchange for concessions on wages and other matters.

Thus, it is fairly clear that a binding past practice can be repudiated by giving timely notice of the intention to do so. Once this has been given, it falls to the party seeking to continue the practice to negotiate this into the contract. One cannot simply assume that because the underlying language did not change, that the practice will continue.

Thus, as in the Eden Prairie and Gillette Co. cases set forth above, if the language is clear, the party seeing to keep the practice must change the language in order to change the result. If the language does not change the implication is that the practice was repudiated.

Conversely, if the language is ambiguous and the practice has been used to clarify it, the party seeking to change the practice must seek to amend the contractual language in order to change the result. If the language does not change the implication is that the practice remains in effect.

PRACTICE TIP: Note too that the repudiation should be very specific. I do not believe that sending a general letter stating that “any and all” past practices will end as of the end of the contract term and leaving it at that will be sufficient. I could not find any reported case were that scenario was presented but it would seem that in order to repudiate a practice the notice must be quite specific as to what that practice is and what the party seeking to change it wants to do with it.

FURTHER PRACTICE TIP: If you have successfully repudiated the practice be careful not to re-start it.
In one other case, the employer was able to successfully repudiate a past practice but then made the mistake of re-upping it during the life of the next contract. The city had a practice of allowing its 911 dispatchers to leave city hall for lunch. There was little question that this was a binding past practice and everyone agreed it was.

City hall moved to a new location that was next to a major rail line. The city argued during negotiations that it would no longer allow dispatchers to leave for lunch. First, there was a risk that they could get caught on the wrong side of the tracks during an emergency. Second, the new city hall was much larger and had a nice lunch room for people to eat and be available for emergency calls. The city argued during negotiations that the practice needed to change since the underlying reason for the practice had changed.

When the new contract went into effect there was language that disallowed people from leaving. That should have been the end of the practice but the city continued the practice for more than 8 months after the execution of the CBA. The problem arose when the police chief continued to allow dispatchers to leave for lunch without consequence and with his full knowledge for almost a year after the execution of the new contract.

When a new chief came on board, he wanted to revert to the contract language. In that circumstance, the practice had essentially been re-started and could not be changed during the life of the current agreement without negotiation by the parties. Thus, be very careful to actually stop the practice or you may unwittingly restart it. See, *IAFF v City of Bloomington, Minnesota*, MN BMS # 4-PA-99 (Jacobs 2004).

Certainly, this practice likely was repudiated again in the next round but the case stands as a reminder to make sure (as the employer did in the Eden Prairie School case cited above) to make sure the practice is changed if the language changes or the practice is repudiated.

**REPUDIATION OF A PRACTICE THAT IS REALLY A MANAGEMENT RIGHT**

The simple answer here is that one cannot “repudiate” a management right by sending a letter to the employer during negotiations. Likewise, a clearly defined right or benefit in the CBA cannot be done away with or limited simply by sending a letter stating, “we won’t do this any longer,” or words to that effect. Any changes in clear contractual language or reserved rights must be made during negotiations and generally result from an actual change in contractual language.

In one case, the parties had a longstanding practice of allowing the employer to “flex,” i.e. change, employees scheduled days off where they worked on those days to avoid paying overtime. The employer also argued that it was a management right and that a “repudiation” of a past practice where that practice was nothing more than the exercise of a managerial right, was not effective. One simply cannot do away with an inherent management right by “repudiating” it in negotiations. In that instance, if the union wants to change that it must be specifically negotiated and placed in the CBA.

It was a clever ploy but ultimately the evidence showed that the “practice” was in fact based on clear contract language and was nothing more than the exercise of a managerial right. See, *City of Forest Lake, MN and LELS*, MN BMS 13-PA-0861 (Jacobs 2014).
ARBITRABILITY

INTRODUCTION AND SCOPE OF THE TOPIC

It is an old saw in labor relations that arbitration is really meant to protect the process by which contracts are administered and enforced. Thus, while the arbitration process is meant to be relatively free from technical and legalistic procedural requirements, there are procedures that must be followed. More importantly, there are procedures that the parties have imposed on themselves and that they look to the arbitrator to enforce.

This topic will discuss some of the more frequent procedural and evidentiary issues that are in the nature of a procedural objection that arise in the arbitration process. Raising objections to certain evidence or arguments by the other side can keep a damaging piece of evidence out or at least point out to the arbitrator that the other side is attempting to use weak evidence at best to prove its case.

There are also issues that can arise over the substantive sorts of arbitral rules that have arisen over the years to protect the grievance process and assure its fairness.

There are two types of arbitrability objections: procedural and substantive. Procedural arbitrability essentially rest on a defect in timeliness or some other procedural error and seeks to dismiss the case before ever reaching the merits. As Elkouri notes, in that chapter the issue of arbitrability can be raised either before the arbitrator or potentially in the courts, but that generally, the issue of procedural arbitrability is decided by the arbitrator, not the Court. See, Elkouri 8th Ed. 6.2.B. See also, The Common Law of the Workplace, St. Antoine, BNA Books 2005 at sections 1.25 and 2.23.

Substantive arbitrability is essentially a claim that the arbitrator has no jurisdiction or power to render a decision on the question at hand. See generally, Elkouri and Elkouri, How Arbitration Works, 8th Ed. BNA books Chapter 6. See also, The Common Law of the Workplace, St. Antoine, BNA Books 2005 at sections 1.24 and 2.23.

Substantive arbitrability questions can, depending on the contract, be heard and decided by the Court or by the arbitrator. See, Elkouri 8th Ed. at Section 6.2.A. The 8th Circuit has though, in at least one case, decided that substantive arbitrability issues in an alter ego case are to be decided by the Court. See, Sheet Metal Workers v Whitney 670 F. 3rd 865, 192 LRRM 3089 (8th Cir. 2012). Substantive arbitrability issues can and frequently are raised after the arbitration hearing if one side feels that the arbitrator exceeded their powers under the CBA.

TIMELINESS AND PROCEDURAL ARBITRABILITY

One issue that comes up frequently is the question of timeliness of grievances. Even the newest of labor relations advocates knows that there are time limits in the contract that must be followed or there will be certain consequences to the grievance process.

Time deadlines – miss the time and your “dead” – that’s why they call them that.

Elkouri notes “In the vast majority of cases, arbitrators strictly enforce contractual time limitations on the time periods within which grievances must be filed, responded to and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements. Untimely grievances will be refused a hearing. Untimely responses will result in the grievance being automatically sustained.” Elkouri and Elkouri, How Arbitration Works, 6th Ed. at page 217-18. See also, The Common Law of the Workplace, St. Antoine, 2nd Ed. 2005 at Section 10.3, page 364. That seems simple enough but issues arise over when the time starts to run and when it stops.
Time limits must be “consistently enforced” if a party wishes to have an arbitrator dismiss a case on the basis of timeliness. If there is evidence to suggest that the parties have been lax, many arbitrators will be reticent to deny a grievance a hearing on the merits. Thus, parties should be ready to give evidence one way or the other to support their respective positions on this question.

Where parties have adhered to strict time limits there are numerous cases upholding the defense of procedural arbitrability based on untimely filings, even if that was caused by simple human error and no prejudice occurred to the other party as the result. See e.g., State of Minnesota and AFSCME Council 6, State of Minnesota BMS (Miller 1993). See also, SEIU #113 and Robbinsdale Care Center, 2009 WL 3222670 Minnesota BMS (Gallagher 2009).

Time limits are generally regarded as jurisdictional. Since arbitral jurisdiction derives exclusively from the labor agreement, any procedural requirements must be adhered to in order to confer jurisdiction to the arbitrator to hear the merits of the case.

On the other hand, there is a large body of arbitral precedent in favor of hearing matters on the merits as opposed to dismissing them on what some might call technicalities. See, See Elkouri & Elkouri, How Arbitration Works, 8th Ed, BNA Section 5.3.A.i., ch. 5 p. 10 (2016), citing Rodeway Inn, 102 LA 1003, 1013 (Goldberg, 1994). See also, City of Cedar Rapids, Iowa, 90 LA 870 (Allen, Jr., 1988) ruling that “public policy favors the resolution of grievances upon their merits and opposes grievances being defeated on technical or procedural grounds unless that consequence is clearly specified by contract. That is to say, policy favors a finding in favor of the viability or arbitrability of grievances and holds that ambiguities should be resolved against forfeiture for procedural reasons”).

If there are ambiguities in the language or evidence of proper, although not perfect, filing of grievances in a fashion, arbitrators will generally lean in favor of hearing the matter on the merits.

When does the time start?

In some cases, the time limits for filing grievances does not commence until the grievant and the supervisor have had a chance to discuss and confer regarding the dispute and have had a chance to try to resolve it informally. In those cases, the contract does not call for specific time limits until after that step had been exhausted. In those circumstances, there is no real guidance as to when the grievant is to bring the issue up to the supervisor nor is there any time limit on how long this informal process was supposed to take. In that scenario, with such loose contract language it will be difficult to impose any sort of strict time limit on the formal filing of a grievance. The employer is left with almost a common-law laches or unreasonable delay argument.

Obviously, it would be best to have contract language that clearly spells out when the grievance is to be filed from the date on which the event giving rise to the grievance occurs. In the alternative, one party should at the very least send something in writing indicating that the time clock is running and give a date on which that party believes is the last date on which the next step or formalized written grievance must be filed.

Discovery of the event/reasonable diligence - What if the language reads something like this: “The designated union representative(s), with or without the employee, shall attempt to resolve the matter with the employee’s immediate supervisor within twenty-one 21 calendar days after the employee, through the use of reasonable diligence, should have had knowledge of the first occurrence of the event giving rise to the grievance.”
What is reasonable diligence? When should a grievant know or be charged with the knowledge of that event? In a case involving a dispute about pay or benefits is it the day the paycheck actually comes? These are all questions that arbitrators face frequently and will depend on the facts of each case. See generally, Elkouri and Elkouri, How Arbitration Works, 6th Ed, at p. 279-280. The operative events that give rise to a grievance may not always be known the moment they occur; or the implications of a certain action might not be known for a while either.

On the other hand, as Elkouri, notes, a grievance procedure cannot simply be ignored merely because the grievant or the union was not paying attention or “just didn’t think of it.” Elkouri also notes that where an employee clearly had knowledge of an event and its possible implications, the union cannot be heard to argue that the limits should be extended because it did not know. Elkouri, at p. 280.

These cases will turn on their unique facts. Parties seeking to enforce strict timeliness should be prepared to show clear communication of the “event” and any possible results of that action so the arbitrator knows exactly when to start the stopwatch.

**When does the time end?**

What if the stated time deadline falls on a legal holiday or a weekend? In one case, the contract called for a 60-day time within which to appeal from the last step of the grievance procedure to the arbitration step. The 60th day fell on a Sunday and the appeal letter was sent the following business day. The employer had a very strict policy adhering to the stated time lines and argued that the matter was barred.

The union cited provisions of state law applicable to timely filing of Court documents, and argued that under state law where the last day of a stated time frame falls on a weekend or legal holiday the time shall be extended to the next business day.

The matter was held to be timely. See, AFSCME #5 and State of Minnesota, MN BMS # 15-PA-0725 (Jacobs 2016).

There is also a need to determine if the terms “days” means business or calendar days. This too may depend on contractual language and might depend on how that term is used in other parts of the contract.

The result here may well depend on how strictly the parties have enforced time limits in the past. If there has been lax enforcement of them the arbitrator may well look past any technical deficiency that does not cause prejudice to the other party and allow the case to go forward.

On the other hand, if there has been strict enforcement of time limits in the past, even though the mistake was due to inadvertence or a simple human error, it may not. In State of Minnesota and AFSCME Council 6, MN BMS (Miller 1993) the arbitrator dismissed an appeal that was late even though it was caused by simple human error and inadvertence. There the union argued that there was no prejudice shown due to the late appeal but the arbitrator ruled that he had no power to alter the terms of the grievance procedure.

**What does the grievance have to look like and where does it have to be filed?**

In some cases, the grievance procedure will specify that a formal grievance must be submitted and that it be entitled “grievance” or filed on an official form and served on a particular person.

If that is the case, those rules, if enforced in the past, may well be enforced now.
If on the other hand, the grievance procedure says that the complaint must be “registered” within a certain time frame, that implies that there is no special form that the grievance must take. All that requires is that the employer be notified as to the issue with enough specificity that an arbitrator can later determine whether it was “registered” or not.

In one case, the contract language required that the “complaint” be “registered within 10 days” and that the complaint must be in writing. The first obvious question was, within 10 days of what? The second was, what does “registered” mean?

The ruling in that case was that registering the grievance meant putting the complaint, i.e. the issue in dispute, must be in writing in some fashion to the employer. In that case an e-mail to the employer outlining the benefits the union asserted were due to its members was enough. The fact that a more formal “grievance” was filed much later did not eliminate the initial registration of the compliant as required by the terms of the grievance procedure. See, UFCW #653 and Fresh Seasons, LLC, MN BMS #15-RA-0927 (Jacobs 2017).

Make sure grievances are filed with the proper office if there is a contractually mandated or prescribed office or person/position to whom to file it. See, State of Minnesota, Dep’t of Corrections, and SRSEA, MN BMS 07-PA-0788 (Bognanno 2007), where the appeal was dismissed because even though it was timely submitted to various other places and despite the finding that the State knew that the union desired to appeal the matter to arbitration, it had been filed with the wrong office. There was apparently a contractually prescribed office to file the grievance, but sent it to the wrong place.

**PRACTICE TIP:** it seems obvious but there is very little incentive to wait until the very last day to file a grievance. In the case before Arbitrator Bognanno, had the union filed it a day or two earlier the error could well have been caught and the filing corrected. Since it was apparently sent on the very last day it could be there was no margin of error and the grievance was dismissed on timeliness grounds.

**What are the contractual consequences for missing the time deadline?**

Are there any? Many contracts have clauses in them that state clearly that failure to adhere to the time limits “shall” result in a waiver of the grievance or that it was deemed settled based on the last response from the employer. If that is the case the contractual limits will generally be held to apply.

If though there are no stated consequences, that might give an arbitrator grounds to go forward on the merits depending on the circumstances. If the language says, “may” result in a waiver etc. of the grievance, instead of “shall” or “will,” that too might give an arbitrator grounds to go forward on the merits.

Also, be aware of language requiring adherence to ALL of the steps in the grievance procedure. There are cases where the grievance itself was timely filed initially but later steps of the grievance procedure were not followed, resulting in the dismissal of the case. See e.g., City of Bozeman, MT and Montana Public Employees, MN BOPA (Jacobs 2017) (the grievance procedure required that a formal request for arbitration be made to the administrative agency within a certain time frame. Even though the initial steps of the grievance procedure were followed, that one was missed).

**Prospective events**

When the employer announces that it will change a policy when is the actual “event” giving rise to the grievance? For example, if the employer posts a notice in March indicating that shifts will change effective June 1st is the “event giving rise to the grievance the date of the posting or the date of the change? Many arbitrators hold that it is the latter date. See, Elkouri and Elkouri, How Arbitration Works, 6th Ed. at 280.
This is based on the notion that the parties might well be able to discuss a possible resolution to the issue before the need to file a formal grievance arises and positions get hardened. Further, circumstances may change between the two dates obviating the need for a formal grievance as well. Finally, there is the notion that the “event” is the event, not the notice of the event. See also, *Simpson on Contracts*, West Publishing 1965, at Section 193, p 387-88.

These will depend on the facts. I think a good argument can be made though, to extend the time lines until there is evidence of actual adverse action or consequences even though there was something done earlier that affected that. If the employer changes the seniority date but there is no adverse consequence of that until months later it could well be the latter date that is the “event.”

**Waiver of timeliness defense.**

Elkouri notes that if the parties allow a grievance to move from step to step in the process without making objections to timeliness, the right to object may be deemed to have been waived. See Elkouri at 6th Ed. at Page 219 and footnote 104 and cases cited therein. Elkouri 8th Ed at 5.7.A.iii. See also *Crestline Exempted Village Schools*, 111 LA 114 (Goldberg 1998) and *Liquid Transporters*, 99 LA 217 (Whitney 1992), *Autoquip Corp.*, 98 LA 538 (Chumley 1992), *Multipackaging Solutions* 129 LA 1152 (Jacobs 2011), *City of Chicago and Policemen’s benevolent Ass’n*, 156 LA Supp. 11496 (Goldstein) and 2015 AAA LEXIS 289 (Crystal 2015) all standing for the proposition that timeliness cannot be raised for the first time at the hearing.

Elkouri also has citations to the contrary however. See Elkouri 8th Ed at 6.4, where he states that “the right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing. He also states that “no uniform rule exists as to this question.” (Citations omitted). There is some sense that this may be true with regard to substantive arbitrability but that the failure to raise procedural arbitrability questions may result in a waiver if they are raised for the first time or very near the time of the hearing.

Elkouri 8th Ed also notes at Section 5.7.A.iv, page 5-34, that “in many cases time limits have been held waived by a party who had recognized and negotiated a grievance without making clear and timely objection. But there are some cases holding to the contrary.” (Citations omitted).

See also, Elkouri 8th Ed at Section 5.7.C page 5-42, where he cites “an important element for an employer’s successful insistence on time limitations is whether the employer raised the issues throughout the grievance procedure and not just at arbitration.” See, *Electro-Motive Diesel, Inc.*, 132 LA 234 (Petersen 2013). There the arbitrator found the grievance to be timely since the employer had raised the timeliness issue all along but stated that “many arbitrators, … have denied an employer’s assertion of untimeliness of a grievance, when it is not raised in the lower steps of the grievance procedure, and thus became a “new” argument when first brought up in arbitration.” Id. at 239.

It is thus generally good practice to raise any issue of timeliness and any substantive arbitrability issues, right away, well before the hearing in order to preserve that defense. Failure to raise the defense in a timely fashion may well give rise to an argument that here was prejudice to the other party and to the process itself by lying in wait, so to speak, to raise such a material defense until the hearing itself or leading the other party into believing that there were no procedural arbitrability issues that could well have impacted settlement discussions early on in the grievance process.

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50 It was somewhat odd to note that despite this general statement by Elkouri’s authors, the actual citation for those in the footnote that accompanied it were in some cases to the opposite effect. In *Fort Frye School Dist.* 91 LA 1140 (Dworkin 1988) the arbitrator ruled that the failure to raise a timeliness defense until the hearing did constitute a waiver. See also, *Super Market Service Corp.* 89 LA 538 (DiLauro 1987) where the arbitrator ruled that the arbitrability issue could not be raised for the first time in a post hearing brief – where it was not raised at the hearing. Suffice it to say that there is a difference of opinion as to the issue of waiver if this defense is not brought up until the hearing.
What if the employer is late getting a response to a grievance or is untimely in some way?

This will depend on the contractual language itself. Many CBA’s simply say that the employer is to get back at the next step of the grievance procedure within a certain time frame. Many though also state that the failure to do so simply allows the union to move it to the next step or are silent on what happens if that is the case. In those cases that will be the prescribed consequence for an employer missing a time deadline or the union will be allowed to move it to the next step without any further formal action.

In one case though, the language provided as follows: “If management fails to schedule or answer the grievance in a timely manner, as per the AGREEMENT, and does not file for an extension in writing, the grievance will be upheld.” (Emphasis in original).

The employer failed to comply with that provision and the arbitrator granted the grievance on that procedural ground, saying that the grievance was “granted solely on the basis of the Employer failing to answer in a timely manner.” See, West Virginia University Hospital and Laborers Union, #814, 133 LA 170 (Fagan 2014).

Equitable estoppel as it may relate to timeliness issues

What if one side leads the other to believe that they are not in disagreement with the other’s position and asks them to wait a while before filing anything formal or “getting the lawyers involved,” and essentially give them the “limp leg” until the time for filing the grievance has passed. Only then does that party then say they now ARE in disagreement and that it is too late to file a grievance.

While labor relations’ decisions are typically based on the contract, there is the possibility of the application of the doctrine of “equitable estoppel,” which is an equitable doctrine at common law, where one side essentially leads the other on in an effort to ambush them later.

“‘Estoppel’ or ‘equitable estoppel’ is a ‘defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.’” Elkouri and Elkouri, How Arbitration Works, BNA Books 7th Ed. ch. 10 p. 74, quoting BLACK’S LAW DICTIONARY 571 (7th ed. 1999). Additionally, “an equitable estoppel argument based on justifiable reliance of settlement negotiations can, in a proper context, prevent a defendant from relying on a time-barred defense.” Michael E. Chaplin, Reviving Contract Claims Barred by the Statute of Limitations: An Examination of the Legal and Ethical Foundation for Revival, 75 NOTRE DAME REV. 1571, 1583 n. 52 (2000), citing Hollins v. Yellow Freight Sys., Inc., 590 F. Supp. 1023, 1028 (N.D. Ill. 1984) (noting that equitable estoppel may be invoked where a defendant made statements during the course of settlement negotiations which were calculated to lull the plaintiff into inaction and to induce a reasonable belief that the claim would be settled without suit.)

See also, McWaters & Bartlett v. United States, 272 F.2d 291, 296 (10th Cir. 1959) (Estoppel, in the event of a disputed claim, arises where one party by his words, acts, and conduct led the other to believe that it would acknowledge and pay the claim, if, after investigation, the claim was found to be just, but when, after the time for suit had passed, breaks off negotiations and denies liability and refuses to pay.).

There are labor arbitration cases that apply estoppel principles to grievance timeliness issues. In Quality Beer Distributors, 73 LA 669, 670 (Ziskind, 1979) the employer improperly laid off an employee for several weeks beginning in November 1978.
The parties’ contract contained a 30-day grievance filing period; however, based on the employer’s representations that it would make the employee whole, the union did not file a formal grievance challenging the improper layoff until January 26, 1978, one week after receiving written notice from the employer that it would in fact *not* pay the employee the back wages that it had previously promised. Under those facts, the arbitrator rejected the employer’s timeliness objections, stating that:

Regardless of who might be responsible for the misunderstanding, the delay in filing a written grievance did not impose an element of surprise upon the Company or deprive it of an opportunity to check the facts within 30 days of alleged breaches of the seniority scheme. It was not prejudiced by the delay in converting the verbal complaint into writing. On the other hand, to penalize the grievant for relying upon what he and his business agent thought was a promise to pay would punish them for a cooperative, rather than a belligerent attitude.” Id. p. 67.

In *Central Hardware Co.*, 103 LA 679, 682 (Cipolla, 1994) shortly before the employer went out of business and closed its stores, on January 28, 1994 the union requested a complete list of all employees eligible for severance pay under the labor contract, as well as confirmation in writing that the employer would pay all severance pay required by the contract. In its response, a couple weeks later in mid-February 1994, the employer’s vice-president informed the union in writing that “we plan to abide by the terms of the labor contract.” Id.

However, when the laid off employees received their final paychecks, the employer did not include severance pay as it had promised earlier. The union attempted to contact the employer about the failure to provide severance pay, however the employer did not respond until four days later on March 7 when its bankruptcy lawyer informed the union that the employer would not pay its employees the severance pay as it had promised. Id. Accordingly, the union filed a formal grievance on March 8, which the employer considered untimely as filed outside the contract’s 3-day grievance filing period. The employer in *Central Hardware* denied the grievance on the basis that the union should have filed its grievance within 3 days of March 3rd when the employees received their final paychecks.

The arbitrator there rejected the employer’s timeliness arguments, stating that the employer’s early promises to abide by the labor contract “indicates, that at the very least that the Company was planning to pay severance pay to its former employees that were entitled to severance pay,” and furthermore “the union was not put on notice of the Company’s refusal to pay severance pay until the Company’s bankruptcy counsel in Chicago indicated to the union’s counsel on March 8 that the Company was not going to pay severance pay.” Id.at 683.

Arbitrators might well overrule grievance timeliness objections on estoppel grounds where the untimeliness can be attributed to the employer’s own words and actions. See, e.g., *City of Chicago, Dept. of Water*, 1991 LA Supp. 105005 (Berman, 1991) (ruling that the employer was estopped from raising the defense of untimeliness with respect to a grievance filed after the date that the employer assured the union that the union’s complaint “was being looked into”). “Even if [grievance filing] time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement.” Elkouri, Ch. 5 p. 33, *citing Berklee Coll. of Music v. Teachers Local 4412*, 858 F.2d 31 (1st Cir. 1988).
In *UFCW #653 and Fresh Seasons, LLC, MN BMS 15-RA 0927* (Jacobs 2017), when the employer also went out of business, the union asked both in effects bargaining over the consequences of that action and later in an e-mail to the employer, that certain accrued benefits be paid to the laid off workers. The employer acknowledged that it owed those workers the benefits, but claimed it did not have access to the funds to pay them and asked for more time to “work with the bank” to get the money necessary to pay those benefits. The union was exceedingly patient and did not take any formal action for months, although the parties met several times to discuss getting the benefits paid. The employer continued to tell the union that it owed the benefits and even though it did at one point say that there was no money and no way it would or could pay the employees.

When the union finally took formal action to seek arbitration, the employer claimed it was too late – the union was told many times there was no money and should have filed the grievance earlier.

In that particular case, the grievance procedure language was very favorable to the union and required only that the complaint be “registered” with the employer, which it was only a few days after the stores closed. Equitable estoppel though played a part in the determination that the grievance was arbitrable and timely even though the “formal grievance was not filed for a year.

What if the grievant is unable due to disability to understand what happened to him/her?

In *AFSCME Council 6 and State of Minnesota, Brainerd RTC, MN BMS 00-PA-116* (Jacobs 2000), the time limits were clear and provided for a 21-day limit within which to file the grievance from “the date the grievant had or should have had knowledge of the event giving rise to the grievance.” In that particular case, the grievant was fired and was handed a letter in the presence of the union representative to that effect but missed the time deadline for filing the discharge grievance.

You would think that would be a clear-cut case, but the union raised a unique argument. The grievant presented a letter from his treating psychiatrist that he was unable to understand the nature or the implications of the termination (actually his mental state was to some degree why he was being terminated). The union argued that the contractual limitation should not apply since the grievant did not have the requisite understanding of the event giving rise to the grievance. Oddly enough though, he stopped coming to work after he was discharged.

One can imagine other scenarios involving illness or disability where the grievant might not understand or even know the nature of the event that might in some unusual circumstances toll the limitation period until such time as the grievant could understand it or it was shown that the union had actual knowledge of the event. In this case though the union was present when the termination letter was handed to the grievant. The difficulty was that the union could never reach the grievant to find out if he wanted to challenge the termination until well after the time limit had run. The grievant apparently went into hiding and despite several letters and phone calls, no one could reach him.

Perhaps the best thing to do in those circumstances is to file the grievance anyway and preserve the time limit and then dismiss the grievance later if the grievant decides not to go forward.

**Continuing grievances**

One of the time-honored exceptions to the rule that untimely grievances are not considered is the notion of a so-called continuing grievance. This generally involves the scenario where the allegation is that there is an ongoing violation of the agreement that occurs every day. Arbitrators generally do not dismiss these cases if it can be shown that there is a continued violation but may limit any remedy to the contractually provided time limit.
Elkouri notes that many arbitrators have held that “‘continuing’ violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence.’ These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing.” Elkouri, *How Arbitration Works*, 6th Ed. at pages 218-19, 281-282. See also, Elkouri 8th Ed at 5.7.A. ii.

This again seems simple enough but the question always becomes whether the nature of the issue is in fact an ongoing violation. There may also be a claim that the union or grievant has acquiesced to a particular practice, or that it has even become a binding past practice if the evidence shows that the union and the grievant knew about it long enough and never filed a grievance over it.

There are potential ways to negotiate language to limit these. In one case, the parties negotiated language as follows: “A grievance relating to pay (wages, hours, vacation and days off, etc.) must be submitted in writing within thirty (30) days after the payday for the period during which the grievance occurred. Failure to give such notice shall be a permanent waiver of the rights to pursue such grievance.”

Also, language setting the time limits from the “first” date on which there are any claimed violations of the contract, may also be effective in disallowing a continuing grievance theory. It is not completely clear, if language like that would work, as it would require employees to pay very careful attention their paychecks and benefit statements to determine accuracy. One can also envision the argument that either the employee did not understand these statements – as many are confusing, or that they relied on the employer’s assertions that they were accurate only to discover later that they were not. Each case will of course be different.

Since most continuing type grievances are over wages, hours or other benefits like vacations etc. this language might work to limit a continuing grievance and even get it dismissed if the grievance is filed after the prescribed time frame set forth in the agreement.

Ideally, there should be some negotiation history for this to make it clear that the language is intended to limit the application of the continuing grievance theory. This will be a fairly fact-specific case but if there is persuasive evidence that the parties truly intended to limit the application of the continuing grievance theory, an arbitrator might be persuaded to do just that and dismiss a grievance filed after the prescribed time limits. It will also require that people pay close attention to their paychecks and other benefit statements to make sure they are accurate and can file a grievance in a timely fashion over any claimed errors or discrepancies.

**SUBSTANTIVE ARBITRABILITY ISSUES**

**LAST CHANCE AGREEMENTS – OR OTHER DOCUMENTS SPECIFICALLY LIMITING ARBITRAL JURISDICTION**

While the scope of this discussion is not intended to delve deeply into the intricacies of last chance agreements, LCA’s, many of them specifically limit the arbitrator’s jurisdiction to whether or not the employee violated the terms of the LCA. Many of them, especially the well drafted ones, will state that the arbitrator has the power only to determine whether there was a violation of the specific terms of the LCA and if so, the consequence is generally termination.

There is no power to “fashion a remedy” as there might otherwise be in a typical just cause case. It is a “if X then Y” case.
The question might well be whether there was a violation of the specific terms of the LCA or not. While the grievant may well have violated some other rule or committed an infraction, that might not be covered by the LCA itself and arbitrators sometimes approach these kinds of cases very cautiously.

See generally, Elkouri and Elkouri, *How Arbitration Works* 8th Ed. BNA Books, at page 15-52 to 15-57, Section 15.3.F.iv for a more thorough discussion of what LCA’s should contain. There are some specific requirements that LCA’s should have in them and how they might be held invalid. For example, Elkouri notes that generally LCA’s must be signed by the union as well as the employee and that one that is signed only by the employee might run afoul of the NLRA.

These cases will be very fact specific and depend on the language of the LCA itself. Where there is clear language limiting the powers of the arbitrator to determine only whether there was a violation of the LCA and then what the consequences of that determination is/are, that is the extent of the arbitrator’s power. The arbitrator will be limited in the ability to fashion a remedy or impose something other than what the LCA calls for.

**SUBSTANTIVE ARBITRABILITY – A VERY QUICK LOOK**

The scope of this topic is not intended to cover the wide range of issue that can arise in substantive arbitrability cases. For more information see Professor St; Antoine’s excellent reference book, *The Common law of the Workplace*, BNA 2005 at Sections 1.24 and 2.23. Substantive arbitrability issues are generally decided by the Courts even after an arbitral award. This many time arises in the form of a challenge to the award that the arbitrator exceeded his/her powers.

**MANAGEMENT RIGHTS**

Employers frequently assert that the issue in dispute is a matter of managerial rights or discretion and therefore is not subject to the arbitration clause. unions frequently counter that the broad general statements contained in the management rights clause are subject to more specific terms of later sections in the CBA and that typically the grievance procedure calls for arbitration of any dispute over the terms expressed in the agreement, or words to that effect.

These will be very fact specific cases and will depend entirely on any number of the following issues: the terms of the management rights clauses – how broad and all-encompassing are they really? How specific are the clauses the union seeks to base its case on? Do they really cover the issue in dispute?

The item in dispute itself – is it covered somewhere in the CBA or by binding past practice or is it truly a matter of management’s discretion? Even if the decision is within managerial discretion, does it have an impact on other benefits or rights guaranteed by the CBA that ARE covered by the grievance procedure?

The question of whether the item is a management right will thus depend on the exact issue in dispute and the contractual language involved. Parties should be prepared to argue these salient points in such a case. The union must show the arbitrator that the dispute/issue is covered somewhere in the labor agreement and that the grievance procedure was intended to allow arbitration over it. The employer should be prepared to argue that the CBA does not cover this specific issue and that it is a matter of managerial rights or discretion.
ADDING A NEW CLAIM THAT WAS NOT PART OF THE ORIGINAL GRIEVANCE

This objection essentially asks the question what are you grieving. Does it place the employer on sufficient notice of what is being grieved? Be careful about the wording of the grievance itself. If the nature of the case or the theory of it changes it may be a good idea to memorialize it in writing so everybody is on notice of the nature of your claim/defense well before the arbitration to avoid the objection that the arbitrator does not have jurisdiction under the terms of the grievance to consider whatever you are bringing up now.

EXAMPLE #1 - Adding an entirely new claim

This may be a problem, especially if the new claim is added at or immediately before the hearing. The issue is one of fundamental notice to the other side about what is being arbitrated and may well draw an arbitrability challenge on the grounds that it is in effect a new grievance and may even be barred now by the grievance time limits.

In one case, the question was whether the employer had violated the contract when it required employees to pay for certain training expenses. The contract at issue provided in relevant part as follows: “Employees shall be paid straight time at account wage rate for all account-specific, State mandated C.E.U. and Company required training. Overtime will be paid in excess of forty (40) hours in a workweek.”

The union’s original grievance was about the cost of the training, i.e. tuition. Later however the union sought to claim the pay for attending the training as well, i.e. wages, even though the training was done before the employees were actually hired and assigned to work. The union asserted that the grievance was general enough to allow for the inclusion of a claim not only for the training itself but also for the wages lost by the affected employees. The union asserted that the grievance clearly was about both the training and the pay for attending the courses.

The arbitrator denied the grievance on a number of grounds and rejected the union's claim that the grievance was general enough to place the employer on notice that there was a claim for wages along with the claim for reimbursement of the cost of the training itself. See, SEIU #26 and ABM Building Security, FMCS CASE 060321-54667-7 (Jacobs 2006).

EXAMPLE 2 - Adding a new theory for the original claim

This may be allowable depending on the facts and the nature of the grievance itself. As long as there is adequate notice of what the grievance is seeking and why, i.e., at least some citation to the pertinent contract provisions allegedly violated, it could withstand an arbitrability objection.

In one case, the union claimed a violation of the CBA where senior employees were laid off since they did not possess a certification to perform certain work. The union alleged that this violated the seniority clause of the contract.

Later, about 6 weeks before the hearing, the union claimed that there was a collateral violation of the CBA due to the Employer’s failure to provide the training necessary to get the certification and cited a different article of the contact. The union claimed that there was a collateral violation of the contract since no opportunity was given to the affected employees to get the training that would have given them the certification.

The Employer objected on the basis that this was really a new claim with a separate contractual provision alleged to have been violated. Even though they had been notified of the “new” basis for the claim well prior to the hearing they alleged that this was essentially a new grievance.
The ruling was to allow the separate basis for the claim of a violation of the seniority clause but not to allow any additional claims to be made, such as reimbursement for the training the senior employees should have gotten. See, *AFSCME and Hennepin County – North Point Clinic*, BMS 10-PA-0170 (Jacobs 2010).

Two factors are at play here. The first boils down in most cases to notice to the employer of what the grievance is and whether they have had a reasonable opportunity to defend the case and bring further appropriate evidence. This will vary depending on the facts of each case and whether there was any discussion about it prior to the hearing. In the case cited above, the fact that the union notified the Employer well in advance of the hearing was deemed relevant.

The second is over whether there is a new claim made or whether there is an additional basis for the same claim that was originally made. This is akin to the argument about newly acquired evidence – i.e. whether the new evidence is about some new claim entirely or is merely an additional piece of evidence for the old claim.

**PRACTICE TIP:** Parties should bring this up BEFORE the hearing in order to avoid a ruling that disallows a piece of vital evidence or requires a party to re-file a grievance, which may be time barred by now, and have to go through a separate process.

**DOES THE ARBITRATOR EVEN HAVE THE POWER TO GRANT THE REMEDY SOUGHT IN THE GRIEVANCE?**

**IS IT A MATTER FOR NEGOTIATION?** - The policy is silly and we just don’t like it –

What if the arbitrator is asked to strike down an attendance policy on the basis that it was not reasonable? What if the contract allows the employer to promulgate a “reasonable attendance policy” and the grievance was over whether sick time for each day should be counted as one “occurrence” under the no-fault attendance policy? The prior policy had defined “occurrence” as up to 3 days of sick time if the illness was due to the same reason.

The arbitrator should properly rule that there was jurisdiction to either strike it down as unreasonable or not, but did not have the power to actually change the parties’ contract under the guise of the power to fashion a remedy – that is for parties to negotiate for themselves.

**You’re just an arbitrator but we’d really like you to be a workers compensation judge or maybe a district court judge applying the ADA or some other statute**

In another case the union sought to have the arbitrator essentially award a job to a grievant who had suffered a work-related injury. The employee injured her arm and wrist as the result of repetitive motion and had permanent restrictions on her activities. She worked with a job placement person who attempted to find work for the employee within the employer’s facility, which was a large metropolitan hospital. After months of search they found nothing.

The union claimed that the employer was stonewalling and simply disqualifying her from jobs she could have done with minor accommodations.

The Employer on the other hand argued that the employee was extraordinarily picky about the jobs she wanted and turned several promising positions down out of hand because of the hours.

There was also the 800-pound gorilla in the room and that was her very extensive set of restrictions that disqualified her from most jobs. She wanted a job that would allow her to work with one hand and wanted a one-handed keyboard for her computer. The employer balked at this arguing that working on a keyboard was what hurt her in the first place; why would working at a keyboard with her other hand be different?
The matter was more appropriately handled in a Workers Compensation Court. What the employee was really asking for as a light duty job to be created for her within her restrictions but there was no contractual basis for that. Bottom line – there was no relief the arbitrator could order no matter how sympathetic the grievant was. See, AFSCME #1164 and Fairview Hospitals, FMCS 080123-52903-3 (Jacobs 2008).

**Matters that the contract specifically disallows from being grieved**

Finally, is there any specific exclusion of this particular item from the grievance procedure? These clauses are usually pretty apparent, but sometimes a clever advocate will try an end run around that by arguing something else in order to get at the one thing excluded from the grievance procedure. Generally, though, if there is a clause excluding a particular item from arbitration or limiting the grievance process to a grievance step prior to arbitration and no further, that will be enforced by the arbitrator.

In one case, there was a specific exclusion for merit pay increases to certain faculty members at a major university. The union sought to end run that though by claiming that the process by which those merit pay increases were granted was improper and asked that the arbitrator order the employer to essentially re-run the entire process.

That was a clever argument but most of the grievances did not survive the clear language in the grievance process specifically excluding such matters from arbitration. See, Education MN and University of MN, Crookston, BMS CASE #’s 09-PA-0142, 09-PA-0143, 09-PA-0144, 09-PA-0145 & 09-PA-0146 (Jacobs 2009).

In many cases, there is a claim that the remedy sought is within the employer’s inherent management rights. This is really more of a substantive argument that will depend on the language of the contract and the underlying facts.

**OBJECTIONS TO ARBITRABILITY AND BIFURCATION OF THE HEARING.**

See generally, Elkouri 6th Ed. at 287 and 288 and 8th Ed. at Section 6.3.B, page 6-13. There appears to be something of a split on the question of whether an arbitrator should rule on the arbitrability questions before reaching the merits of the case. Elkouri’s research indicates that Court and arbitrators go both ways. Obviously, the parties can choose to present the entire case on both arbitrability and the merits in one hearing.

The issue may well depend on the nature of the procedural objection. If, for example, the issue is a one involving timeliness or an alleged defect in the grievance itself or in the processing of the grievance steps, the arbitrator could bifurcate the hearing and deal with the procedural issues; as they may not involve the merits of the case.

It may also depend on how complicated the issue is. In cases where there are no disputed facts, as is the case sometimes, it may be better to submit the issue on stipulated facts and argument, especially if there is no need to have live testimony.

On the other hand, if the issue is complicated and there are disputed facts, it will be best to hold a hearing on the procedural piece and go forward with the merits and have the arbitrator render a decision on procedural arbitrability as part of the overall decision.

In cases involving substantive arbitrability, it may make more sense to hear the entire case as the issues of substantive arbitrability could well be inextricably woven. This of course will depend entirely on the facts of each case but since substantive arbitrability issues can be both complex and the subject of considerable evidentiary dispute, it is better in my view to go forward with the whole case and preserve your respective arguments on the merits and substantive arbitrability issues for post hearing briefs.
SOME LESSONS FOR ARBITRATORS

Some of these have been learned the hard way. The list is by no means exhaustive but here are a few things to keep in mind:

What is judicial/arbitral temperament? There is no “one” definition of this, but you must always be the adult in the room and the voice of both neutrality and authority. YOU run that hearing but you must do so in a manner that both keeps control of it and sends the message that you are unbiased and fair to all – even to those who are not getting what they want.

Keep your cool. My son is a teacher and has a T-shirt that says “Stay calm and teach on.” If you are uncomfortable making a ruling on a difficult objection – call for a short break to consider what to do next. Once you have made that ruling – move on. As noted above, you’re like an umpire – you call balls strikes safe or out. You don’t see umpires change their rulings even though somebody argues with them.

Pre-hearing issues – some of which can be pretty contentious:

Subpoenas. I usually sign them as a matter of course and if one side raises an objection, hold a conference call and allow both sides to submit whatever they want in support of their positions.

Pre-hearing motions – You will have to decide how much “evidence” you need and is appropriate at this stage. You have not heard the case yet but there may be motions of dismissal based on contractual language or some MOU etc. that you will need to see and consider.

If it’s akin to a motion for summary judgment remember the judicial standard – talking the evidence in the light most favorable to the non-moving parry is there still a claim that can be made?

Do you need a live hearing at all? In the wake of the COVID 19 flu scare, I have had many ask for remote hearings. Not a bad idea. Technology exists not to allow hearings to be done by Skype or some other Internet based technology that allows people to be in several locations and the hearing can go on that way.

There are also cases where the parties can stipulate to certain facts and allow the arbitrator to make the call based on those. If there are no facts in dispute consider doing the case be written briefs and maybe a conference call.

Hearings in a virtual world. With the pandemic almost all cases are being heard virtually, at least for now. One of the main questions is whether the hearing should be held in person, as they have been all along, or virtually using one of the many virtual platforms, like Zoom, WebEx, Go-To Meeting or Skype. There are two schools of thought here.

Arguments in favor of a live hearing: Those that espouse this assert that there is nothing better than a live hearing to assess witness credibility you can see facial expressions better, hear them batter and see total body language. It is also easier to exchange exhibits and other pieces of evidence. It is also easier to see the arbitrator’s body language and gauge whether a piece of testimony has an impact on him/her. Those in favor of live hearings also point to the sometimes annoying problems of Internet glitches or that some folks just do not have the technology, or the technological knowledge to participate.

There are also issues with security of virtual hearings and there are issues with whether the witness is alone or being coached somehow. Is there anyone else in the room or near them? Is the attorney texting them during the testimony to suggest answers that are not visible to on the screen?
Arguments in favor of virtual hearings: Travel expenses are minimal and overall costs are greatly reduced. Virtual hearings make actually make it easier and better to assess witness testimony and credibility. If they are live, at least for the foreseeable future, their faces will be half or more covered with a mask and they may be 15 or 20 feet away from the arbitrator. They may not be able to hear as well or their responses will not be audible if they are masked, which may then elicit a need to re-ask the question. This gives them chance to re-think about their answer and, as the arbitrator, I need to hear their “first” answer

Exhibits can be exchanges before the hearing by e-mail, which saves paper and expense. (Nobody has to stand in front of a copier making 4 or 5 copies of the entire exhibit book).

Exhibits can be “shared” during the hearing, at least they can be on Zoom, which is by far the most ubiquitous platform these days. That allows a participant to hit the “share screen” button and put up a document on the screen for everyone to see. That can be downloaded or simply emailed later if it is to be introduced.

People can testify from wherever they are without the need to travel to a single location and sit around for hours, waiting for their testimony. They can stay at work and join when needed.

Security issues have been addressed and the meetings can have a password or security code that only those who have been invited can use.

Breakout rooms can be set up so each side can speak to each other without the arbitrator or the other side hearing them. This allows for people hundreds of miles apart to talk to each other in caucus.

If there are issues with whether a witness is alone, the arbitrator can simply ask them if they are alone and if there are doubts, pan the room. Also, since everyone is generally visible on the “Brady bunch” screen, you can see if anything illicit is going on. Plus, no attorney is likely to risk their license by coaching a witness in some nefarious fashion during their testimony.

There are glitches that occur but these can be handled usually by having the witness re-join or call in from a cell phone. There travel issues that can arise as well that are more difficult to handle if things go awry. Re-setting up a Zoom meeting after someone has lost their connection is a lot easier to deal with than a cancelled or delayed flight and the arbitrator is stuck in Atlanta

Who decides if there is a dispute about the type of hearing? The situation arises all too frequently now where one party wants a live hearing and the other wants it held virtually. They will have their reasons and they are generally both valid. It places the arbitrator in something of a conundrum and you will have to make a call in enough time to allow for either type to take place. For example, it is very easy to convert a live hearing to a virtual one by simply sending out the link and cancelling the travel. Not so easy to do it the other way, so this decision should be made at least 30 days in advance.

In my opinion, it is the arbitrator’s call. NAA Opinion #26 provides that the arbitrator should respect all views on this and take input from all parties. You must take all factors into account though and take stock of the factors such as the pandemic, travel restrictions, whether the parties have the knowledge and equipment for a video hearing, time issues and/or health considerations. See Opinion #26 attached to this document. It is best to have agreement, but ultimately it is the arbitrator’s call.

SOME HOW TO’S ON VIRTUAL HEARINGS: As daunting as the new technology is they are easy to set up and schedule. I like Zoom but there are other platforms. Zoom allows you to schedule a meeting and send it directly to your Outlook or Google calendar and to the parties’ as well. The link can be forwarded to whomever they want.

Make sure you set your account to allow for the host, and that should be you, to set up break out rooms.
Have the parties send you their exhibits a day or two in advance so they can be downloaded and even printed if you like.

Make sure your computer has a video camera or you can buy a separate camera and microphone that can be hooked up. Test your speakers in advance.

Open the meeting a little early just to be sure it’s working. There are also tutorials available on various websites that are very helpful. Practice with a family member if you are unfamiliar with these platforms and you’ll find they work pretty well.

**DISCLOSE EVERYTHING!**

Obviously, arbitrators should disclose those things that might fall into the category of a material matter as defined by statute. This includes any prior employment or relationship with the parties or counsel. This includes former partners or associates, family members or close acquaintances. Any prior relationship with a party must be disclosed right away. Have to recuse yourself form a case or having a party recuse you after disclosure is not a problem. Having it discovered after the decision is a major problem, as you can imagine.

Keep in mind that the duty to disclose is ongoing. Thus, if you discover that you know or have had a relationship with a witness, you should disclose that, even if it happens at the hearing itself or when you sign a subpoena.

Always maintain a professional distance. As an arbitrator, I counsel to be very careful going to a party, retirement event or a golf outing etc. sponsored by one side or the other.

You can always be friendly, but you may not be able to be their friend.

**EXCESS OF POWERS**

This will be very fact specific, but entails a claim that the arbitrator exceeded the powers granted in the grievance procedure. This can include amending or modifying the contract or going beyond the issues that the parties asked the arbitrator to decide.

This can arise in past practice cases where the CBA is either silent or has language that is different from the parties’ past practice. See e.g. *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981), discussed in the past practice segment above, where the arbitrator found that the parties’ practice with respect to vacation accrual rates differed from the clear language of the contract. The County asserted that the arbitrator had exceeded his powers in applying past practice in lieu of the clear contract language. The Court affirmed it though due to the clear statement that the parties had in fact replaced the language with their practice.

Be clear about that in the award and make sure you use the Trilogy language in fashioning a similar award.

It can also go to remedies. The *Enterprise Wheel and Car* case from 1960, supra, made it clear that arbitrators have the power to fashion remedies as long as those draw their essence from the CBA. However, there have been cases that have overturned arbitrators in some limited cases. See e.g., *Baltimore Regional Joint Board v Webster Clothes, Inc.* 596 F.2d 95 (4th Cir, 1979) where the Court held that an arbitrator did not have the power to award punitive damages absent proof of willful or wanton conduct by the beaching party. See also, *Island Creek Coal v UMW District 28*, 29 F.3rd 126 (4th Cir. 1994) affirming a lower Court ruling that vacated an arbitral award of punitive damages and *College Hall Fashions v Philadelphia Joint Board*, 408 F. Supp. 722 (E.D. PA 1976).
DEALING WITH EMOTIONAL WITNESSES
Witnesses will sometimes get very emotional when talking about the events in question. My advice – play it by ear. Many witnesses will pull themselves together right away and want to keep going to just get it over with. Let the witness and perhaps the advocate give you a sign on this.

If the other attorney is badgering the witness and there is an objection, rule on it and take some time doing it to allow the witness to get their emotions under control. If there is no objection, I have simply asked the witness if they are OK, but be careful though so as not to suggest bias.

There is no hard and fast rule here. It will depend on how things are going and how sordid the details are. Assaults sexual harassment complaints and others can be pretty stressful.

DEALING WITH OBJECTIONS
There is no “magic” to this. If an objection is raised, ask for the basis for it and give the other party a chance to respond. Resist the notion of ruling too quickly even though you might think the answer is apparent.

Sometimes the question just needs to be rephrased or repeated. Make sure you understand the question too. You can stop the hearing if you think you need to and take a little time to think about whether you want the evidence or not.

In camera review. Sometimes it may be appropriate to look at the evidence first before taking it – if it’s a document or video etc. You can then make a determination of whether the evidence is relevant or not or whether it should be admitted or not.

MOST IMPORTANT: Make your ruling and move on.

DEALING WITH THE OBJECTIONABLE
Some advocates take their advocacy to an inappropriate level. There are a few obstreperous and intrusive folks out there – although I’ve frankly never seen it in Montana.

Don’t argue with them.

Admonish them that their antics are not helping their case and to cease whatever they’re doing.

If appropriate call for a break and let things cool down.

Sometimes take just the advocates into the hallway or private area and let them know that YOU are in charge of the hearing not them and that you will not tolerate outbursts, profanity, yelling or badgering or threats of any kind.

Remember, you’re the adult in the room. Stay calm and arbitrate on!

DRAFTING THE DECISION
Your decision must draw its essence from the CBA.

It must be based entirely on the evidence – nothing more; nothing less.

Don’t guess at the evidence.

Don’t assume evidence was there or would have been there unless it WAS there. If so – cite it.

Take the adjectives out. There was evidence to prove X or there was insufficient evidence to prove X. Make your decision based on that.

Don’t be pejorative or chide the parties. There was evidence to prove the case or there wasn’t. Signed. Now, here’s my bill.
Don’t advise the parties how to do it better next time. It may be OK to say that if the evidence had been different the result may have been different but you’re there to answer the question that was asked. You are not there to ask another question the parties didn’t ask and answer that.

**APPEALS OF ARBITRATION DECISIONS**

**CAN AN ARBITRATION DECISION BE APPEALED TO COURT?**

**ANSWER:** Yes, but the grounds are limited. The first step is to go to the applicable District Court. Montana Code Annotated, MCA, 27-5-312, sometimes referred to as the Uniform Arbitration Act, sets forth grounds and the process for the appeal. Obviously, one should consult competent legal counsel before attempting such an appeal.

**MCA 27-5-312 - UNIFORM ARBITRATION ACT BASES FOR APPEAL**

The statutory grounds in Montana are as follows;

1. Upon the application of a party, the district court shall vacate an award if:
   (a) the award was procured by corruption, fraud, or other undue means;
   (b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
   (c) the arbitrators exceeded their powers;
   (d) the arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of 27-5-213, in a manner that substantially prejudiced the rights of a party;
   (e) there was no arbitration agreement and the issue was not adversely determined in proceedings under 27-5-115 and the party did not participate in the arbitration hearing without raising the objection; or
   (f) a neutral arbitrator failed to make a material disclosure required by 27-5-116. An award may be vacated because of a material noncompliance with 27-5-116 no later than 90 days following discovery of the failure to disclose.

2. The fact that the relief could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

3. An application under this section must be made within 90 days after delivery of a copy of the award to the applicant, except that if it is predicated upon corruption, fraud, or other undue means, it must be made within 90 days after the grounds are known or should have been known.

4. In vacating the award on grounds other than those stated in subsection (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the agreement or, if the agreement does not provide a method of selection, by the court in accordance with 27-5-211 or, if the award is vacated on grounds set forth in subsection (1)(c) or (1)(d), the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with 27-5-211. The time within which the agreement requires the award to be made is applicable to the rehearing and commences on the date of the order for rehearing.

5. If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

See also, MCA 27-5-312; 27-5-116
Appeals of arbitral awards are rare and even more rarely result in a judicial modification or reversal of an arbitrator’s award. Practitioners must thus be aware that they must “make their case,” so to speak, at the arbitration stage and not rely on the courts to change or reverse the award.

**POST DECISION REQUESTS**

Post decision requests happen occasionally where a party seeks clarification of an award, correction of a typo or other mathematical error or even for “reconsideration.” That last one is a not so subtle request to change the award because they didn’t like it.

Requests for clarification are allowed if one party, or both, are unclear as to how they are to comply with the award. This is especially true where the arbitrator has retained jurisdiction to deal with any issues regarding the award.

**MT Code 27-5-313.** Allows for a Court to “modify or correct the award if:

(a) there was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

(b) the arbitrators awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(c) the award is imperfect in a matter of form not affecting the merits of the controversy.

(2) If the application is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

**MT Code 27-5-217** also allows an arbitrator to modify or correct an award on those same grounds.

In most states, there is no formal procedure to “reconsider” the award on grounds other than those listed above, but you might get one. I would caution against changing the award absent the most unusual circumstances. Keep in mind that no evidence can be introduced after the record closed and you might get a party who wants to try to introduce an affidavit or something indicating that you got it all wrong.

You made the call based on your best judgment and your best effort to review the evidence. Stick with it.

**WHAT IS YOUR LEGITIMATE ROLE?**

My father used to say that being an arbitrator is like being an umpire. You call balls and strikes, out or safe. You don’t tell the batter how to bat or the pitcher how to pitch or the manager how to manage the team. Once you make a call; that’s it. Move on.

Never keep score. It doesn’t; matter how often you rule in favor of one side or the other. Each case is different and decided on its own unique facts.

You are not a mediator. If the parties had been able to settle the case they would have done that already. If they want to talk settlement at the hearing; let them but stay out of their way. I was shocked once when during a seminar a very experienced arbitrator claimed that after the opening statements he could see where the case was going and would call the parties into the hallway and try to cajole a settlement. Don’t do that. That’s is not only not your job it is contraindicated.

My father also left me with one very good piece of advice: “never decide a case until you’re heard it. All of it,” he used to say. “You never know, the evidence might make some difference to you.” Indeed that is all that should make a difference.
APPENDIX

Video Hearing

Issue:

Can an arbitrator order that a matter proceed by way of a video hearing at the request of one party over the objection of the other party to the arbitration?

Opinion:

This advisory opinion is provided in the context of the world-wide COVID-19 pandemic of 2019-20. However, this opinion’s analysis of video hearings may have broader application in other circumstances. The reader also is referred to Advisory Opinion No. 13 on the subject of ex parte hearings for helpful insights relevant to the question considered in this opinion.

The Code, in its preamble, states that, “Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations.” The principle of mutual consent is of fundamental importance to the Academy, and is reflected in the Code, in advisory opinions, and in arbitrator practice. This opinion concerns a possible exception to the principle of mutual consent.

In Section 5.A, the Code offers general guidance regarding hearing conduct: “An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.” In addition to this obligation, an arbitrator has an obligation pursuant to Section 1.C of the Code to “endeavor to provide effective service to the parties.”

In the absence of a collective bargaining agreement or an ad hoc agreement of the parties prohibiting such an arrangement, an arbitrator in exceptional circumstances, without violating the Code, may order that a matter proceed by way of video hearing in whole or in part without mutual consent and over the objection of a party. In doing so, the arbitrator must determine that a video hearing is necessary in order to provide a fair and effective hearing. In making that determination, the arbitrator must weigh the obligation to “conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves” under Section 2.A of the Code, and to “conform to the various types of hearing procedures desired by the parties” under Section 5.A(a) of the Code.

When the issue arises, the arbitrator’s first recourse should be to assist the parties in reaching a mutually acceptable resolution in the prehearing process. As noted in Section 4.A of the Code: “The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing.”

If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh in favor of the video hearing option, particularly if the hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator’s decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator’s judgment, be offset by countervailing factors, such as a party’s lack of
necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

As with all procedural issues that an arbitrator must decide, this issue will need to be addressed in a prehearing process that gives the parties an opportunity to make submissions and/or arguments. The arbitrator will decide whether the matter will proceed by video hearing based upon the arbitrator’s judgment on whether the circumstances are so compelling as to override the usual presumption in favor of consensual scheduling practices. (An arbitrator also might consider a telephone conference hearing, applying factors addressed in this opinion if the arbitrator views that as a more workable or acceptable alternative.) Nothing in this opinion imposes an affirmative obligation to order a video hearing absent the agreement of the parties.

In order to provide an “adequate hearing” by way of video, the arbitrator must be familiar with the platform offered to the parties, and must be confident that the parties have such familiarity as well, or have reasonable access to an effective alternative platform.[1] As well, the arbitrator will be required to address prehearing matters such as the delivery of documents and how evidence is to be offered and admitted at the hearing, including restrictions on remote witnesses to ensure the reliability of the witness’s testimony. A prehearing conference also can anticipate how to proceed, if at all, if there are interruptions in the effective use of video technology.

Adherence to the foregoing will allow an arbitrator to provide “effective service” in “a fair and adequate hearing” when proceeding by way of a video hearing.

1. Section 1.B of the Code requires that “When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator’s competence, the arbitrator must decline appointment, withdraw or request technical assistance.” In the context of a video hearing, this would obligate the arbitrator to ensure that he or she is sufficiently familiar with the operation of the platform to be able to conduct and control the hearing, and advise the parties how to effectively make use of the process. Technical assistance may be obtained through a video conference service provider. The corollary point is that if the parties have requested a video hearing, and the arbitrator does not wish to undertake such a proceeding or does not feel competent to proceed in that manner, the arbitrator must so advise the parties. If the parties still wish to proceed by way of a video hearing rather than in an alternative manner, the arbitrator will withdraw from the matter.
Arthur Pearlstein  
Director of Arbitration, Federal Mediation and Conciliation Service  

Christine Newhall,  
Senior Vice President, Labor/Employment/Elections Division  
American Arbitration Association  

Dear Mr. Pearlstein and Ms. Newhall,

I am the Chair of the Committee on Professional Responsibilities and Grievances for the National Academy of Arbitrators. Recently, I have been asked to provide advice on the following scenario:

An arbitrator has accepted a case and is scheduled for an in-person hearing with the parties. Prior to the hearing, the arbitrator becomes concerned that an in-person hearing, under any circumstances, may pose an unacceptable health or safety risk to the arbitrator. The arbitrator proposes to either conduct a virtual hearing or postpone the hearing to a later date. The parties object.

If this scenario was presented as a complaint against a member under the Code, this would be my opinion:

CPRG Advice Letter – Videoconference Proceedings

In Opinion No. 26, dated April 1, 2020, the CPRG addressed the issue of whether a matter could proceed by videoconference at the request of one party over the objection of the other party. That Opinion outlines the relevant considerations in such cases. The issue arose in the context of the current worldwide pandemic, but may have broader application. As pandemic restrictions ease, this scenario may arise:

An arbitrator has accepted a case and is scheduled for an in-person hearing with the parties. Prior to the hearing, the arbitrator becomes concerned that an in-person hearing, under any circumstances, may pose an unacceptable health or safety risk to the arbitrator. The arbitrator proposes to either conduct a virtual hearing or postpone the hearing to a later date. The parties object.

The arbitrator should inform the parties as soon as the arbitrator decides that it is not safe to attend an in-person hearing. The arbitrator should then explore a mutually acceptable alternative to a hearing where participants appear in person. The parties may agree, for example, for certain participants to be physically together in a hearing room, while the arbitrator and/or other participants attend remotely.

If the parties desire participants to be present in person, however, and the arbitrator concludes this poses an unacceptable health and safety risk to the arbitrator, the arbitrator is unable to proceed in a manner that respects the parties’ mutually-desired procedure. The parties’ right to choose their own dispute resolution procedures is of fundamental importance in the Code, as recognized in the preamble as well as in Section 2A.
Section 1.C of the Code requires the arbitrator to “endeavor to provide effective service to the parties.” Accordingly, after disclosing an inability to proceed in person, as the parties wish, the arbitrator should withdraw from the case. Withdrawing from the case under these circumstances does not violate the Code. This advice is consistent with the direction in Opinion No. 26 that, if an arbitrator is unwilling or unable to offer a video hearing, the arbitrator must so advise the parties and, if the parties wish to proceed by way of video hearing rather than an alternative process, the arbitrator must withdraw.

An Advice Letter represents the judgment of the Chair as to what the result of a probable cause determination would be, after consulting with at least two other members of the CPRG. It is not binding on the CPRG itself, or on future Chairs, and with advance notice to the designating agencies, it may be withdrawn or modified by the Chair who issued it.

Very truly yours,
Jeanne M. Vonhof
Chair.
Committee on Professional Responsibilities and Grievances
National Academy of Arbitrators
January 11, 2021

Arthur Pearlstein  
Director of Arbitration Services  
Federal Mediation and Conciliation Service

Dear Director Pearlstein:

This letter is a follow-up to the conversation we had on Friday with Barry Simon, the Academy’s Designating Agency Liaison Coordinator, and Jeanne Vohof, the Chair of the Committee on Professional Responsibility and Grievances. In that conversation, you raised the increasing problem of arbitrators withdrawing from cases rather than deciding whether a hearing should proceed in person or virtually, where the parties could not agree.

The Academy has previously provided guidance on an arbitrator’s authority to order participation in a virtual hearing over one party’s objection (Advisory Opinion No. 26 (April 1, 2020)). The necessary implication of that Opinion is that an arbitrator also has the authority to order participation in an in-person hearing over one party’s objection. The CPRG Chair has also provided guidance on the appropriate course of action when an arbitrator has a good faith belief that a previously agreed upon in-person hearing is dangerous to the arbitrator’s health, but the parties insist on proceeding in-person (Advice Letter, June 26, 2020).

The underpinning of these opinions is the arbitrator’s obligation to provide “a fair and adequate hearing,” and to “endeavor to provide effective service to the parties.” An arbitrator faced with this dispute must first seek to assist the parties in coming to a voluntary resolution. It may be, for example, that an in-person hearing can be held if the parties are willing to wait until the vaccines are widely administered or the pandemic wanes. Or the parties may agree to have some participants attend in person and others attend virtually. There is an endless array of options available. Such discussions are usually effective. If, however, no agreement can be reached, it falls to the arbitrator to decide.

Opinion No. 26 discusses the factors that an arbitrator should consider in deciding whether to proceed in-person or virtually:

*If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh*
in favor of the video hearing option, particularly if the hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator’s decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator’s judgment, be offset by countervailing factors, such as a party’s lack of necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

All of this, of course, takes place in the context of a world-wide pandemic with a very contagious, mutating virus, and that may be a strong factor in favor of a virtual hearing. The history of the parties or the nature of the grievance may argue strongly in favor of an in-person hearing. That is for the arbitrator to decide. But it should be decided. Neither Advisory Opinion No. 26 nor the Advice Letter contemplates that the arbitrator should simply withdraw from the case in order to avoid making a decision on a disputed procedural matter. Withdrawal is only contemplated where the arbitrator finds a virtual hearing is appropriate, but lacks the technical competence to conduct a virtual hearing, or where the arbitrator concludes that participation in an in-person hearing, where both parties want an in-person hearing, is unreasonably dangerous.

You mentioned that some concerns have been raised, particularly among less experienced arbitrators, that deciding a novel and controversial issue may be costly in terms of acceptability. That is an understandable concern, but it ignores the very negative consequences for the arbitrator of sending the parties back to square one, and the danger of being known as an arbitrator who is afraid to make a controversial decision. A well-reasoned ruling may disappoint one of the parties in that moment, but it is also likely to enhance the arbitrator’s standing with both parties, and in the field.

In sharing these observations, I do not purport to be making a statement of Academy policy or offering an interpretation of the Code of Professional Responsibility. Each case has its nuances, and each arbitrator must make his or her own judgments. My only advice, based on nearly 40 years as an arbitrator, is that we should always be mindful of our duty to provide fair and effective service in the resolution of our parties’ disputes.

With my very best regards,

[Signature]

Dan Nielsen, President
National Academy of Arbitrators