OVERVIEW & INTRODUCTION

- 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
WHAT WE WILL DISCUSS

- Process of arbitration – how does it work
  - BOP issues; general procedure – pre hearing issues; issues that come up during the hearing; evidentiary issues
- Discipline – what are the standards
  - Some specific types; serious offenses; insubordination; social media issues; marijuana offenses & off duty conduct;
  - Defenses to discipline and due process issues that can arise
WHAT WE WILL DISCUSS

- Contract interpretation
- Past practice issues
- Management rights
- Seniority and different types of clauses
- Arbitrability – procedural & substantive
- Appeals of arbitration decisions
  - Disclose everything
  - Excess of powers
WHAT WE WILL NOT DISCUSS

- INTEREST ARBITRATION
- NLRB STANDARDS
- POLITICS
SCOPE OF ARBITRATION

- Be careful what ask for – you might get it
  - 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 power stems from that agreement.
STEELWORKERS TRILOGY


- General proposition that arbitration is THE favored method for resolving labor management disputes
STEELWORKERS TRILOGY

- Arbitration decision must “draw its essence from the labor agreement.”
- Arbitrators have broad powers – decider of law and fact and of the remedy
- “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.”
However, arb. Cannot “dispense own brand of industrial justice”

- At the time it was seen as a limit on arbitral power. Arbitrator cannot amend, modify or change the contract in a grievance case – limited to interpreting the agreement

In Past Practice cases if the award “draws its essence” from the CBA it will be enforced.
Arbitrators have a LOT of power to determine the facts and the law of the case.

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 that? For the arbitrator to determine!
BURDEN OF PROOF ISSUES

- In discipline cases – ER has the BOP
- In contract cases where the claim is that management violated the CBA - the union has the BOP
- Burden of proof is the burden to establish your claim by sufficient weight of the evidence necessary to persuade the arbitrator/trier of fact
BURDEN OF PROOF ISSUES

- **Preponderance of the evidence – 50% +1**
  - Usual standard in contract cases and some discipline cases

- **Clear and convincing**
  - Sometimes used in major discipline cases or where the conduct could be criminal

- **Beyond reasonable doubt**
  - Generally not used even in cases where conduct could be criminal
RULES OF EVIDENCE - Evidentiary issues – so what is it worth?
BOPA 2020

JEFFREY W. JACOBS
ARBITRATOR - PRESENTER
Arbitrators are found of saying that they’ll “take it for what it’s worth.”

So, what is it worth?

How do you make it worth more?

Arbitrations are not Courts – formal rules of evidence are not strictly followed, they are guidelines for what’s admissible.

Rules were invented for juries

If not admitted, it’s worth 0
OVERVIEW

- It’s all about the evidence –
  - Evid. Should help your case – evidence not hurt your case
- Arbitrator knows little or nothing; you DO – don’t forget to tell ME the story
- You cannot change the facts but can emphasize some and minimize others – accentuate the + as the old song goes
Not what you *know*, it’s what you *prove*

Arbitrators decide cases on the evidence and the inferences drawn from it – how you present and argue them are crucial

**KEY IS PREPARATION**
WHY IS THIS DISCUSSION IMPORTANT?

- Even if do NOT carry the burden of proof, w/o the evidence needed to win, you lose
  - ER has BOP in discharge case but if union not know what it needs to mount a defense, how will they?
- First step in the investigation of evidence is to know what you’re looking for.
- Second, is to make sure you can get it in
FIND YOUR FACTS

- Try to think like both sides
  - Who has Burden of proof and what do THEY need to prove?
  - If you do, try to think of what the other side would bring to rebut that
  - What facts do they have – you’re been through the grievance steps and probably know who’s going to say what. What countervailing facts exist?
FIND YOUR FACTS

- Have the advocates followed up on ALL facts and ALL witnesses even though they may be dead ends
- Are they assuming things?.
  - E.G. The case of the fired fish and wildlife director
KNOWING THE ELEMENTS

- THE ELEMENTS – BUILDING BLOCKS OF YOUR CASE

  - Every case has a set of “elements;” i.e. legal or arbitral component parts that must be proven. Research these before and after you start preparing.

  - Know what you’re looking for before you start looking - O/wise you miss critical “golden” facts
This session not designed to detail elements of every possible scenario but as examples:

Past practice – unequivocal; clear; longstanding mutually accepted. Depending on which commentator you read

  - ER – what evidence do you have that these elements are NOT present

Discipline – 7 tests – maybe not all but ? Is – do you have evidence to support all these?

  - If you’re the union – what evidence do you have that those elements NOT present
ELEMENTS OF THE CASE

- Do your facts fit into those elements?
- Arbitrators are analytical and they will look to see if the boxes are checked
- Have the advocates checked all the boxes?
Evidence must be relevant - 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.

St. Antoine – if it tends to support a party’s case or impeach the testimony of a witness
MATERIALITY – The who cares factor

- Evidence must also be material to the case – is the proposition for which the evidence is introduced important to the case.
- Related to the case elements – is the evidence related to one of the elements?
- Example – issue was whether the ER had the right to change job descriptions. Qualifications of the applicants was not material, therefore excluded.
Does it all have to be relevant?

- Maybe not – hard to say sometimes
  - Shulman: 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.
  - One advantage frequently reaped from wide latitude to the parties to talk about their case is that apparent rambling frequently discloses very helpful information which would otherwise not be brought out.

- UAA – arbs can get reversed if leave out relevant information, so we take it for what it’s worth
Relevance

- Others have argued that simply letting it in “for what it’s worth” may not be good practice IF you know you won’t look at it

- No clear answer – BUT the advocate should make a determination – if it’s not helping the case, it may be hurting it

- Is that all you got? Why is this here?

- Does it taint other relevant evidence?
PRACTICE TIPS

1) Don’t confuse relevance with probative value – it may not be weighty but if it has any tendency to make a fact that is important to the case more or less likely, it’s admissible.

2) Have the advocates explained what the evidence pertains to.

3) The arbitrator should explain why the evidence was admitted and whether it was given weight.
AFFIDAVITS

- If signatory not there? Clearly hearsay.
- Within the discretion of the arbitrator
- AAA rules provide that they may be taken but given only the weight as the arb. deems appropriate.
- O/ arbs will exclude them w/o GOOD explanation for why the witness not here
- Practice tip – if the evidence is important have the witness there to testify – phone?
Other statements

- Some are admissible – medical reports, police reports, or customer complaints.
- Even though they are “naked hearsay” many will admit them. Have an air of reliability
- Make a determination though if you need additional testimony to support the statements in those reports.
Customer complaint

- Many ER’s don’t want their customers dragged into a case involving discipline of the EE whom they are complaining about.
- Discussed below, if the record is kept in the “normal course of business” it is admissible. Arbitrator is entitled to give it the weight it deserves.
- How detailed is it? Is it corroborated by anything else? Videos, O/ statements or eyewitnesses?
THE “WITNESS” CAN’T TESTIFY

- Elderly – students- inmates at a correctional facility
- Complains by these sorts of “witnesses” may be impossible or impractical to get
- The elderly may be gone or have fallen ill
- The student, esp. very young ones may not be able to testify – parents may not want it
- You cannot have inmates testifying against the guards
ASSESSING CREDIBILITY

- Consistency with:
  - prior statements,
  - documents,
  - physical evidence,
  - other witness statements,
  - bias or any self interest?
  - Common sense or the laws of physics
Assessing credibility

- The “science” of where people eyes go etc. There is no flag that pops up

- 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)
The issue here is whether the witness, either by testimony or document has adequate knowledge of the events they are describing.

- Did the witness prepare the document? Are they responsible for it being kept in the normal course?
- Did the witness actually see the event? Where were they, when were they there?
- Essential question; do they know whereof they speak?
FOUNDATION – PRACTICE TIPS

- For documents – show the document to your witness in advance of the hearing – do they recognize it? Are they aware of its original?
- Did they draft it? Get them familiar with it so they can testify and be CX’d about it.
- Get witness ID the document and explain how they are familiar with it.
- OBJECTIONS can be based on voir dire-ing the witness to determine if the witness really does know this document – try to stipulate to that in advance if possible.
FOUNDATION – PRACTICE TIPS

- For testimony – make sure the witness has the requisite knowledge for the testimony he/she is about to give – ask that question so you’re not surprised.

- Example, if they witnessed an incident, where were they, what were they doing? How long were they there? Could they see/hear what was happening? Distractions/obstructions?

- Objections – may want to wait for C-X but if witness lacks foundation, make that objection right away. Arb. likely ask for foundation.
Opinions

- If call an expert make sure they are qualified
  - The AA case with the social worker giving medical opinions
  - Lay foundation for the expert
  - Lay foundation for the opinion – are the facts give accurate? WC claims example
  - “Opinions” about what the CBA says – that’s not real persuasive – it may be cathartic but it’s not going to carry the day
Circumstantial evidence

- May be “better” than direct evidence
- Direct evidence is used most often but it can be unreliable – Harvard story
- Circumstantial evidence may be OK but is not really “evidence,” but rather the reasonable inferences drawn from actual evidence. Drill story
Hearsay – What is it?

1. Statement – oral or written
2. Someone other than witness made it
3. Out of Court statement offered to prove the truth of the statement itself

Bottom line – some hearsay is admissible and the formal rules do not apply but it’s inherently unreliable because it cannot be cross-examined.

If it is a salient point use direct testimony – if you don't have it – punt – make your case through your best witnesses.
Hearsay - What it isn’t?

- If not offered to prove the truth of the statement - NOT hearsay
  - A heard B say this – offered to prove truth of what B said = hearsay
  - A heard B say this – offered to prove that A was in the room when B said it = NOT
- Rule 801 defines hearsay - Admissions – not hearsay. Such admissions are against interest are presumed to be true – how reliable is the witness who testifies is another matter
HEARSAY – SOME EXCEPTIONS

- Fed. Rules sections 801/803/804, many of them not list them all here – Look at the floor
- Excited utterances – people didn’t think to lie about it so are presumed truthful
- Dying declaration – statements made on death bed or when people thought they were
- Business records – Kept in normal course
- Testimony re: general reputation of character
- Public records – police reports, birth/death, property, marriage
This is testimony that cannot be examined due to privileges that can be asserted to protect against disclosure.

- Work product – attorney client privileges
- Husband wife
- Priest penitent
- Statements made during settlement or mediation
Careful not to waive it – assert it right away and be mindful of calling a witness and start down the road of giving testimony about privileged information –

don’t open the door
DEMONSTRATION, VIDEOS ETC.

- Pic = 1000 words = being there = 1000 pictures. Site visits can be very valuable.
- If possible show the arbitrator the actual site – vs trying to describe it
- Is there a video? Now there almost always is. Is it accurate?
- Graphs and charts for demonstrative evidence – usually admissible and helpful but make sure they are accurate
OBJECTIONS – I OBJECT! STORY

- Why object – since most arbitrators may take the evidence anyway? To place doubt in the accuracy or veracity of the evidence
- When? Any time hearsay or lack of foundation or other issue. Do it after the question but before the answer
- Cite a basis for the objection – Rule or policy?
- Witness unresponsive or beyond the question
- Probative value
DISCIPLINE – THE 7 TESTS

- NOTICE – Did the company give to the employee forewarning of the possible or probable disciplinary consequences of the employee’s conduct?
  - CLEAR - was it clear and clearly enunciated?
  - CONSISTENT – was it consistent? Lax or spotty enforcement? Was there a contrary message sent?
  - EXPECTATIONS FROM EMPLOYERS – That the employees are clearly placed on notice of what’s expected and what’s OK and what’s not
Reasonable rule

- Was the 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?

- This is the “nexus” requirement especially in off duty conduct cases

- Even if the rule may be unreasonable the EE should obey now and grieve later unless there is a safety issue
Day in Court principle

- Did the company, *before* administering discipline to an employee, make an effort to discover whether the employee in fact violated a rule or order of management?
- Can suspend pending investigation, but be careful not to implement discipline before the investigation done – double jeopardy discussed more later
FAIR INVESTIGATION

- Was the investigation done fairly and objectively?
- A management official may be both “prosecutor” and “judge,” but not also a witness against the employee
- Should be a higher official reviewing the case to determine discipline
GUILT OF THE CHARGE?

- Did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
- This does not require conclusive or beyond doubt, but the evidence should be enough to show that the EE was “guilty.”
- Witness credibility – arbitrator gets to decide – as hard as that is
DISPARATE TREATMENT

- Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
- How similar are the offenses? The EE’s length of service or prior record?
- Has there been lax enforcement of rules?
PENALTY

- Was the degree of discipline administered by the company reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee’s service with the company?

- As above, how similar are the offenses, the prior record and the length of service?

- Does the EE have a “bank of good will?”
What if there are “No” answers?

- Daugherty suggests that a “no” answer to any of the questions = insufficient evidence to support discipline.
- Not all arbitrators agree
- Not all arbitrators use all of the tests –
  - Befort, Cooper and Bognanno U of MN study.
- Daugherty notes that if offense is serious but investigation is bad, grievance can still be denied
What is a serious offense? It’s what the ER defines as a “cardinal offense – i.e. one that gets an EE fired for the first offense irrespective of length of service or prior record.

It can depend on whether the union has agreed to them
Changing societal norms

- Society has changed a lot in 50 years
- Guns at work – what was once considered "normal" is now seen as truly dangerous
- Threats and "figures of speech" – these too have changed. Nobody jokes in a TSA line about having a bomb
- Drugs and alcohol
1st, is it a unilaterally promulgated policy or in the CBA?

- If the former, may well be subject to just cause analysis, above
- If the latter, the arbitrator may not have the discretion to alter the penalty. If X offense = discharge and that’s in the CBA, then arbitrator may have to follow that
- Like a last chance agreement
OFFENSES CONSIDERED CARDINAL IN ONE INDUSTRY BUT NOT OTHERS

- May depend on the facts and industry standards
- Examples – a teacher who “steals a single pencil vs an RN who “diverts” an opioid pill
- Smoking in an office vs smoking in an oil refinery or mine
- Cash businesses and violating the “cash management rules
- What does the rule say and how has it been enforced?
THEFT

- The stolen fireworks
- The salted cash drawer
- The $0.29 cleaning brush
- The frozen shampoo – and rules against taking home “waste”
  - The wheelbarrow story
  - The purloined drill
FRAUD AND INTENTIONAL MISREPRESENTATION

- Is it intentional or good faith mistake?
  - Employment applications
  - Time card fraud – Mower County
  - Punching someone else in – St. Thomas
  - Lying in general – Law enforcement – Brady Giglio issues
INTENTIONAL DESTRUCTION OF PROPERTY

- Intentionally destroying or discarding employer’s property or product is also usually regarded as a cardinal offense.

- The question is whether it is intentional or simply negligent – which also may have disciplinary consequences but maybe not outright discharge.

  - The case of the annoying lockout device.
The real question is whether someone is impaired on duty or whether there use off duty has a “nexus to the workplace – law enforcement, CDL drivers safety sensitive

- What evidence of impairment is there?
- Gas workers case- the “experienced alcoholic
- Hair testing case
ZERO TOLERANCE POLICIES

- Is it really 0 tolerance for discharge?
  - How has it been enforced in the past?
  - Are these polices subject to just cause?
  - Unless there is specific language otherwise, they probably are.
  - Gas Workers case revisited – there was policy that required that the EE be reinstated if they went through treatment – which he did
SLEEPING ON THE JOB

- Usually regarded as a very serious offense, especially if the EE is in a safety sensitive position
  - Failure to watch the patient
  - Lax enforcement – EE asleep at he switch
  - The deputy in rural area sleeping in his car
  - The deputy dozing off in the break room after working a LOT of OT
  - Dozing vs sleeping; “nesting?”
INSUBORDINATION

- Potentially two types
  - Willful refusal to obey a clear direct order from a supervisor or superior authorized to give orders
  - Disrespectful or offensive behavior that undermines the authority of the supervisor or the business
DEFINITIONS

- “A willful disregard of express or implied directions of the employer and refusal to obey reasonable orders.”

- Workplace not a debating society but what is “insubordinate” may depend on the workplace – police dept. vs. social worker dealing with troubled kids
  - Expectation that order will be obeyed without question or is discussion expected or allowed
ELEMENTS - Who is a “superior?”

- Easy cases – managers & supervisors
- Less easy cases – lead people, working foremen, (What if they’re from different departments?)
- Harder cases – outside consultants; security guards working for other agencies
- Bottom Line: Make sure chain of command is clear and clearly stated
ELEMENTS – Was there an order and how clear was it?

- Was this really an order or a “request?”
  - “This is a direct order” vs. “This is for you”
  - Clean this place up when you get around to it
  - The “Office Space” order, if you would like to do this it would be great; I’d prefer it if you did that, etc.

- Regional differences in mannerisms and speech patterns – NY vs. Minnesota

- Standing orders – how well known and enforced
WAS THERE AN ORDER?

- How was the “order” communicated? Do it! Or, I’d prefer it this way?
- How clear is the order?
  - “This is for you” – is in many cases enough
  - Is it a standing order? If the order is clear and understood, it may not be necessary to give a direct order every time.
Was there a refusal of the order?

- “No I won’t” vs “I can’t” – No equipment or knowledge
- “Yes I will” but then it doesn’t get done – is this really insubordination if the employee just forgets about it?
- “Yes I will but I’ll do it my way” – is this insubordination if the supervisor and the employee have a good faith disagreement about how to do the job?
Were the consequences of refusal made known to the employee?

- Related to clarity of the order - essential feature is to make it clear to the employee that refusing or balking at doing what is being asked = insubordination

- Be clear that insubordination will lead to discipline even discharge
  - Is this a “career choice” vs. an example of a so-called “open door” policy to discuss issues
IS IT A REFUSAL OR A DISAGREEMENT ABOUT HOW TO DO THE WORK?

- University of Chicago case – the disagreement about the crate
- Fabcon case – disagreement about how to perform the work safely – related to the safety exception
- General rule still applies: obey now, grieve later
IS IT REFUSAL OR EE ASKING QUESTIONS?

- This is a fact specific case – is the employer asking “reasonable questions” or raising legitimate issues or just stalling?

- CWA and Consolidated Telephone co, unpublished decision (Jacobs 2008)
MITIGATING FACTORS

- Did refusal continue or was there eventual compliance?
- Were there obstacles to compliance?
- How was order communicated?
- Timing issues – telling the employee to work overtime today vs. last week?
- How has this been dealt with in the past? Progressive discipline or immediate termination?
MITIGATING FACTORS

- Personal issues with employees
  - Illness;
  - Religious issues;
  - Other “one-time” exigencies
    - Special family events
    - Other “special” events
DEFENSES

- Refusal to perform work based on safety
  - Refusal must be “reasonable”
  - Safety equipment defective or missing
  - Is the work inherently dangerous?
- Employee generally bears the burden of proof on safety refusals
- Contract violations – obey now grieve later unless extraordinary circumstances
Overtime requests

- See above, but generally the rule is obey now, grieve later unless there are mitigating circumstances.

- Requests for time off – fact specific; is the time truly unrecoverable – a wedding or something special?
If the employee is acting in the capacity of a union official the rules are very different.

The employee is considered an equal to the manager and had far greater latitude to say and do things they might not otherwise be permitted.

Be careful not to get too disruptive – steward is not allowed to disrupt the operation or make threats of violence.
EE ACTING AS A UNION STEWARD

- Steward should make it clear that they are now acting in the capacity of a steward on a matter of union business – either in response to a grievance, an EE complaint or a matter of contract administration.

- As always, whether the steward was “out of bounds: will depend on the facts
DISRESPECTFUL BEHAVIOR

- GENERAL RULE – Don’t call your supervisor an idiot even if he is also at fault or “starts it”

- Does context matter? Swearing at a supervisor at a concrete plant versus in a school or retail store or hospital?
PERSONAL RIGHTS

- There may be some personal rights – religious and others that allow for refusals
- 5th Amendment rights – Washoe County p 50
- Refusal to work on certain religious holidays
- Refusals to sign broad requests for medical information. HIPAA issues
- Refusal to submit to random drug test w/o reasonable suspicion – Pioneer & Utah Power
- Repeated refusal to do a FFD exam may = insubordination and termination.
Is there a difference in insubordination and gross insubordination?

There are polices that distinguish between the two but never define them very well.

Red Wing Shoe case – No and F U no.

Practice tip – don’t separate them – Insubordination is insubordination.
PRACTICE TIPS

- Was the order clear, and that refusal = possible termination
- Did the ER offer explanations and was respectful
- Was EE given reasonable time to perform unless there is a need to do something ASAP
- Consistency in enforcement
OVERVIEW & INTRODUCTION

- Job performance is at the heart of the employment relationship.
- 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?
- Misconduct = doing something wrong vs poor performance = doing something right just enough of it or well enough.
WHAT NOT TO DISCUSS

- Not discuss 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.

- Not discuss how production standards are measured, i.e. time efficiency studies or comparable worth to compare the relative value of jobs
ALTERNATIVES TO DISCIPLINE

- REASSIGNMENT – CAN THE EE BE RE-ASSIGNED TO A MORE APPROPRIATE JOB?

- ACCOMMODATION – (NB – THIS IS NOT ABOUT ADA OR FMLA ISSUES BUT THEY CAN BE A PART OF THIS) – IF EE CAN’T DO THE JOB CAN THE WORK OR WORK STATION BE ADAPTED?

- ASSISTANCE – CAN THE EE DO THE JOB WITH HELP? WHAT WOULD THAT ENTAIL? COST? WOULD OTHER EE’S BE ADVERSELY AFFECTED?
JUST CAUSE FOR DISCIPLINE

- IS DISCIPLINE NECESSARY?  Retraining?
- WHAT EFFORTS HAVE BEEN MADE TO GET EE TO PERFORM?
- HAS PROGRESSIVE DISCIPLINE BEEN TRIED?  TO WHAT EFFECT?
- IS THE EE LAZY OR TRULY NOT ABLE TO DO THE JOB?
JUST CAUSE – ONCE DECIDE THAT DISCIPLINE IS NEEDED

- NOTICE – BUT OF WHAT? STANDARDS TO BE APPLIED AND CONSEQUENCES OF NOT MEETING THEM – BE CLEAR!

- REASONABLENESS OF STD – CAN EMPLOYEES MEET THEM?

- ARE THE STDS NECESSARY TO OPERATION OF BUSINESS?
JUST CAUSE FOR DISCIPLINE

- INVESTIGATION – SAME AS IN OTHER DISCIPLINE CASES – WAS IT FAIR, THOROUGH AND OBJECTIVE?
- Did investigator understand the work and follow up on efforts to train, rehabilitate or investigate problems EE had doing the job?
- Follow up on reasons for poor performance as stated by Union and EE?
- Past performance? Is this just a “rough patch”? 
JUST CAUSE FOR DISCIPLINE

“GUILT” OF POOR PERFORMANCE

- Comparison to other employees – same work? Same conditions? Same equipment? Same training?
- Other factors to be considered – age, physical or mental issues? Is this age related?
- What did ER do about these? – Retraining, re-assignment or demotion?
- Was there adequate equipment?
JUST CAUSE FOR DISCIPLINE

- PENALTY – APPROPRIATENESS OF THE PENALTY
  - The case of the incompetent Admin. Assistant who was great until she got a “better” job

- ARE THERE CBA PROVISIONS COVERING THIS? - DEMOTION, DISCIPLINE DISCHARGE

- DISPARATE TREATMENT CLAIMS? HOW HAVE O/ EE’s BEEN TREATED?
PERFORMANCE STANDARDS

- GENERAL RULE - MANAGEMENT SETS STANDARDS –
  - ARE THERE CBA PROVISIONS? CAN STRICT STDS BE JUSTIFIED AND EXPLAINED?
- QUANTITY – HOW MEASURED?
- QUALITY – HOW KEEP TRACK OF “WASTED OR DEFECTIVE” PRODUCT? HOW KEEP TRACK OF PERFORMANCE?
- BE ABLE TO EXPLAIN ALL THIS
PERFORMANCE STANDARDS

- GOOD FAITH DISPUTES ABOUT HOW TO PERFORM THE WORK
  - Scenario #1 – the case of the shipping box – University of Chicago
  - Scenario #2 – the case of the concrete wall and the supervisor who was 150 miles away - Fabcon
  - Scenario #3 – the case of the second guessing employee who thought he knew what he was doing but didn’t – Cutler Magner
ENFORCING STANDARDS

- GENERAL RULE – MGT AUTHORITY TO ENFORCE STDS SUBJECT TO JUST CAUSE

- Objective vs subjective stds – How measured?
  - Industry standards – how accurate? How applicable to this particular employer?
  - Use of objective stds in “subjective” employment – teachers, RN’s, police, social workers, customer service EE’s, etc.
ENFORCING STANDARDS

- Have the stds changed? Notice to EE of this?
  - Scenario #1 the case of the subjective stds and the last chance agreement – Centre Pointe Energy
  - Scenario #2 the case of the “moving target” stds – monthly quotas changed to a daily quota - Moorhead Public Utility
PRACTICE TIP

- Employers – make sure rules are explained to the arbitrator – why are they important? What problems will occur if they are not followed? The stricter they are the more an arbitrator may want to be lenient to a grievant.

- Unions - explain why the rules are not reasonable or necessary to the operation of the business – & show any inconsistencies in enforcement or difficulties other employees have in meeting the goals and if the ER has treated them differently.
EFFORTS TO PROVIDE TRAINING OR ASSISTANCE TO THE EE

FACTORS TO CONSIDER:

- HAS EE COMPLAINED ABOUT NOT HAVING THE RIGHT EQUIPMENT, SUPPLIES OR TRAINING - IF NOT, WHY NOT?
- WHAT HAS BEEN DONE TO ADDRESS THOSE?
- ER’S CONCERN ABOUT WHY PERFORMANCE SLIPPED
  - ER’s case is enhanced if there is evidence of some genuine concern about why this is happening – offers of EAP or LOA
  - Is the “problem” short term, related to family problems, health emergency or condition –
Some examples

- Gelita and UFCW
- IBT #120 and Ziegler

- Both involved short term employees who were given ample training and “second chances” to improve performance but did not. Discharges were upheld.
PRACTICE TIPS

- Supervisors who give good evaluations but at the hearing claim they didn’t mean it or that the employee’s performance was not “really” good.

- Overlooking or ignoring the mental or physical or even personal related reasons behind why performance has slipped – both parties can be guilty of this and employees may be embarrassed about explaining things like CD, mental illness, family problems – Show efforts to help – or lack of them despite requests for help.
PRACTICE TIPS

- The Sir George Haig problem – failing to know what’s going on out there. Employers should not assume that new technology or equipment is working fine because the salesperson says it is – find out! Because, at the hearing, you will.

- How was the training done? Hands on or out of a book?
  - Can you really learn about a computer system, or an 80 ton bucket loader, without working with it?

- Differences in learning styles – training means explaining something in a way that the EE understands, and EE’s have different learning styles. If your trainer doesn’t know about this – find a different trainer.
ONE THING TO WATCH OUT FOR

- Our work force is getting older – Arbitrators may be reluctant to fire an older worker because they can’t keep up
  - Physical limitation? How are they being accommodated?
  - Differences in abilities re: computers and new technology? Training is very important.
  - Health issues related to aging? What’s going on? Degenerative changes etc.?
COMPUTER MISUSE AND SOCIAL MEDIA ISSUES
SOCIAL MEDIA - IT’S A BRAVE NEW WORLD – AND NOW EVERYBODY KNOWS WHAT’S IN IT

- Expectations of privacy
- How are section 7 rights implicated?
- Social media policies – how valid are they?
- Evidentiary issues – what’s admissible? What’s probative?
- Free speech Issues
- How did the ER get the information - impact admissibility or probative value
STILL NEED JUST CAUSE

- Reasonable rule – on duty not so hard
- Off duty rules – still have to show nexus
- Investigation – still have to prove the violation – may take forensic evidence
- Disparate treatment issues
- Appropriate penalty – how serious? What harm – actual and potential? Length of service and record still relevant
EXPECTATIONS OF PRIVACY - ON DUTY CONDUCT WITH ER EQUIPMENT

CITY OF ONTARIO V QUON

The issue there was whether there was a reasonable expectation of privacy.

City issued pagers with ltd # of texts before additional charges applied.

EE went over the # - city audited the pager to see if his were work related – and the # too low – or whether his were personal.

No expectation of privacy here.
Similar to Quon in terms of expectation of privacy – it’s their stuff and they can audit it or review the contact.

EE’s should be warned about this though just to be safe to let them know – we can and will audit this.

Notice of need to secure the device, passwords or confidential data.
OFF DUTY CONDUCT WITH ER EQUIPMENT

- MANKATO CASE
- COLLEGE COACH – BUT COULD EASILY APPLY TO COP
- PICS of kids that contained some nudity
- Prosecutor overreacted – Court dismissed
- College kept going – Arb overturned
- NB – dismissal not end the case – diff. in std of proof
ON DUTY USE WITH EE EQUIPMENT

- Issue here is the appropriate use of time
- Loafing; “theft” of time
- Could also entail what the public sees
  - RN on her phone PT’s see that; deputy out on road patrol sitting in a cornfield “waiting” for speeders on cell phone, checking e-mail etc.
  - Issues of proof – ER may not have a right to check the employee’s cell records except under subpoena
ON DUTY WITH EE EQUIP

- Can the ER check Facebook account if they are “friends” to see when and *what* is posted? See below for the content discussion – ANS: they might!

- There may be issues of enforcement
  - Are supervisors allowed to access their personal email etc. on duty – what does “ltd” mean in policy that allows “ltd” use of personal cell phones or computers?
The focus is about the content of what the EE posts online – usually thru social media.

Discuss the difference between “old” style griping - #320 in 1982 cops gripe about the Chief in bar after work vs posting some snarky comment online.

Never has so much info accessible to so many for so long. This never goes away.
SOCIAL MEDIA

- NLRB – private sector but might apply to state laws modeled after the NLRA
- CONCERTED ACTIVITY – SEC. 7
- GC memos
- Is it concerted? – O/s involved
- Mutual aid and protection? Or just whining
- Will policy chill exercise of Sec. 7 rights?
EMPLOYER’S POLICY

- IS THERE ONE AT ALL?
  - Nikki Katsouros – CHP posted pic of her death

- WHAT DOES IT SAY – HOW OLD IS IT?

- DO YOU ALWAYS NEED IT – DEPENDS
  - McDonalds EE’s sabotaging food – doing it is bad enough but then posting it to harm the Co’s reputation is another – therein lies the real PX with this technology
Examples of policies: very fact specific!

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

- Sounds innocuous but GC found it unlawful
- Reasonably be interpreted as prohibiting employees from discussing information regarding their own conditions of employment, as well as the conditions of employment of other employees
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.

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.

- Not OK – O/Broad and threatening
- Develop healthy suspicion and not be tricked was OK
- Not OK – check with the ER before posting
Inquiry is 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.

Very fact specific analysis. I think it’s a bit subjective – what “would a reasonable employee think” What does that mean?
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 is not sufficient.

Too nebulous and nonspecific

Arbitrators may need to apply a similar analysis to NLRB
Policies Found OK – were specific descriptions under each item - p. 9

- “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
- Media contacts”
EXAMPLE OF A POLICY THAT IS OK UNDER NLRB ANALYSIS

- GC did find a policy to be acceptable:
  - Know and follow the rules - discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct
  - Be respectful – had examples of bullying or harassing posts. Also referred to intentionally intimidating, harassing or malicious statements.
    - NB as the FN on page 6 - such behavior online is prohibited just as it would be at work
  - Be honest and accurate – general admonition to be fair and honest. Do not post deliberately false rumors about the ER, O/EE’s or the company.
A CHANGING LANDSCAPE - POSSIBLY

- Boeing 365 NLRB 154 (2017); NLRB o/ruled Lutheran Village 343 NLRB 646 (2004).
- Lutheran ruled that policies were prohibited if the rules could be “reasonably construed” by EE’s to prohibit exercise of Section 7 rights.
- Boeing ruled that the analysis will focus on the nature and extent of the impact on NLRA rights and the justification for the rule.
- Boeing upheld a the rule against having cameras in the workplace.
Boeing analysis - 3 categories

1) Lawful rules either no interference with NLRA or the justification outweighs impact

2). Rules that warrant individualized scrutiny. Obviously a fact specific analysis

3). Unlawful rules because they impair protected conduct and the impact is not outweighed by the justification for it.

   For example, a rule prohibiting EE’s from discussing wages or benefits with co-workers.
“NEW” RULES MAY NOT HAVE CHANGED ANALYSIS MUCH

- In Friendship Village d/b/a Brighton Rehab, (2019) Board found unlawful a rule that read:
  - Make sure you are always honest and accurate when posting ... if you make a mistake correct it quickly.
  - Maintain confidentiality of [ER] private or confidential information. Do not post internal reports, policies, procedures or other internal business related confidential communications.
1st rule - found unlawful: EE’s have a right to make inaccurate statements as long as they are not “malicious defamation.”

2nd rule – found unlawful: because such a rule could reasonably be interpreted by EE’s to include information about their own wages and terms of employment

- sounds a bit like the Lutheran Heritage analysis
- Unclear what impact this discussion has on Montana public sector but is included in case it does
NLRB struck down a no-gossip rule against talking about another person’s personal life when not present, their professional life or spreading rumors about another.

Arose out of admissions officer who discussed the firing of 3 other EE’s.

Was done verbally, but the rule applied to social media as well.
Banquet servers – U election

Supervisor yelled at EE’s to get to work

EE posted a message that night – Bob is MF, don’t know how to talk etc. VOTE UNION!

Found to be protected not opprobrious
Knauz Motors, 3658 NLRB No. 164 (Sept. 28, 2012).

- BMW sales event – salespeople talked among themselves – upset with the food choices etc. – affected commissions
  - EE fired for “all out” post on Facebook w/ pics
    - Cheap hot dogs, chips, soda and water
  - NLRB found that this posting was protected
    - Part of concerted activity – EE’s discussed this
    - Not disloyal or “opprobrious” to lose protection
    - Not disparage product or service
    - Not important that post not refer to ongoing labor issue
Knauz Motors, 3658 NLRB No. 164 (Sept. 28, 2012).

- SECOND POST – Land Rover dealership
  - Kid got into a vehicle and got it moving, ended up in a swamp after rolling over his father’s foot
  - EE posted a pic with a snarky message about how the ER “took care” of his customers and vehicles; message was just insulting
  - NOT protected; acted alone not concerted
  - EE go fired but ER had to change its policy
ER fired 5 EE’s for F/book posts about co-worker

EE named a co-worker and complained that she “doesn’t feel we do enough. “ Invited comments – how do U feel?

4 O/ EE’s did and complained about co-worker

Many comments were disparaging and highly critical of co-worker

Some were very graphic in nature
Hispanics United of Buffalo, 359 NLRB No. 37 (December 12, 2012)

- NLRB O/turned – was concerted activity for mutual aid and protection
  - ER argued: cyberbullying & just criticized a co-worker
  - NLRB – 1. classic concerted activity – request for assistance by EE from O/ EE’s about working conditions – was concerted
  - 2. Was for mutual aid and protection from criticism by co-worker at work
  - 3. Not so opprobrious as to lose protection – this will be very fact specific analysis (was coarse language)
  - Was a dissent – criticized EE vs. protection
NLRB O’turned long precedent and allowed EE’s use e-mail for protected activity off duty where they had access to e-mail as part of their jobs.

Held: “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.”
“Like” on Facebook = concerted activity – 
See also Bland v Roberts 2013 p. 14

EE’s criticized ER for tax withholding errors and o/EE’s “liked” it

Comments had to do with ongoing labor issue and was not aimed at general public not opprobrious enough to lose protection
O/ Cases in GC memo of August 2011

- One referred to supervisor as a “scumbag”
  - Was OK - not so offensive to lose protection
- Another referred to supervisors as “assholes” & criticized tax withholding policy – EE’s and customers clicked “like” indicating agreement – “Like” can be concerted activity
  - And yes there are apparently ways to tell who “liked” something
CENTRAL ISSUE FOR ARBITRATORS: WAS THERE JUST CAUSE?

- Was the policy valid? Is it overbroad? Is it specific enough to give the EE notice of prohibited activity?

- Was the activity protected? Was it concerted? Was it for mutual aid and protection?

- Even if the content was concerted, was it so offensive, threatening, bullying in nature or opprobrious in some other way as to lose its protection?
FREE SPEECH IN THE PUBLIC SECTOR

- May be a difference between private and public sector – may also not be a true “social media” issue – i.e. does it matter if it’s on Facebook or an editorial in the local paper.

  - These rights are not absolute and come with limits – much like screaming “fire!” in a crowded theater or threatening to kill someone.
Garcetti v Ceballos and Pickering standard

- First, is the employee speaking as a private citizen on a matter of public concern?
- If not, EE has ltd. 1st Amendment rights.
- If yes, may be protected but question is a balance of whether the gov’t had justification for treating the EE differently from the public based on the employer’s need to operate efficiently and effectively.
FREE SPEECH

Second, is the speech made pursuant to their official duties? If so then the speech may not be protected. Sliding scale.

- Closer to official duties, less likely protected

Is the speech done as private citizen only?

- Cop posting a message criticizing the way an arrest or prosecution was handled – likely not protected
- Cop posting a message about use of public funds to pay for a stadium – might be protected based on the balance of ER’s interest to operate efficiently, the impact on ER and the content of the message
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, depending on other factors listed here.

Whether the speech is about a matter of "public concern" depends – is it funding for a stadium or a personal issue with the Chief?
FREE SPEECH IN THE PUBLIC SECTOR

- Balancing test
- The EE has a right to free speech but the ER has a right to maintain efficient operations
  - Public ER may take action against its EE’s that would be unconstitutional if applied to general public - *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011).
  - This ruling likely applies to Social Media posts as well.
  - The question is how these two legitimate but possibly competing interests are to be balanced
What constitutes “Speech?” Does clicking “like” or “thumbs up” count?

- See also, Triple D Sports case – page 11
- Several EE’s in a sheriff’s dep’t hit “like” on the Facebook page of the current sheriff’s opponent in an election – got fired after he was re-elected
- Was a reversal of a SJ ruling by lower Court so it appears it was sent back for trial on question of why these EE’s were fired.
FREE SPEECH ISSUES

- Elements of a case where EE seeks to prove that the discharge violated 1st amendment
- Speaks as a citizen in a matter of public concern
- EE’s interest outweighed ER’s concern for efficient operations
- That the speech was a substantial factor in the decision to terminate
- (The Bland Court sent the case back to determine that issue)
FACTORS IN DETERMINING THE ER’S INTEREST - P. 18

- (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.

BL: If the EE has a confidential or public contact role he/she has less 1st Amendment protections.
State of Ohio, Dep’t of Corrections and Ohio Civil Service Employee’s, unreported (3-6-13 Pincus)

- State EE posted “OK, we got Bin laden ... let’s go get Kasich next ... who’s with me?” 17 people saw it. Fired for threat against the Governor
- Context – Ohio in the middle of a debate about essentially outlawing unions – ala Wisconsin
- Discharge O/turned; EE reinstated W/O back pay or benefits
- U said was merely a call for political action – arb. Ripe for discipline
- Arb ruled that this was not a threat but was not a mere joke and that discipline was warranted even though EE apologized
City policy prohibited EE’s from “utilizing their positions to influence or attempt to influence the results of a City Commission election.”

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.”
In midst of an election a city cop posted “I work for the city and I will tell you that a change is really needed. Thanks for stepping up!!!” on the Facebook page of an opponent for current mayor – got a 3-day suspension

EE had been given a prior warning

Arbitrator used a slightly different analysis

Was a matter of public concern

Used standard off duty nexus tests –

Harm ER’s business?

Adversely affects EE’s ability to perform duties

Other EE’s unwilling to work with the EE
Union argued that the speech was not political – arbitrator rejected that.

Also based on small size of the city and the evidence that the populace would know who this person was.

Reduced to reprimand for other reasons.

Very little analysis of free speech. Arbitrator focused on whether the EE violated the city policy – Union did not attack the policy itself.
EE was a head start worker who posted “Don’t U hate it when …” inviting other EE’s to post what they hated about the work, the clients and co-workers. Only 4 did. (Quare, does that undermine the notion that social media is important only due to its widespread dissemination?)

Privacy settings were: “Secret. No public content. Members can see all content.”

Coarse comments about parents, teachers & students

EE’s ex husband found them and forwarded to the ER. EE was fired.
ER contended that these were disparaging and cited *Baker Hughes*, 128 LA 37 (Baroni 2010) and argued that this info on a blog should be treated as any other information of this nature.

Union contended that these were private off duty communications and accessible only to a select few people (see below re: issue on how the ER gets the information – apparently that was not raised here).
Arbitrator rejected the claim of concerted activity since EE’s never sought to discuss the supervisor’s lateness (one of the common complaints among themselves).

Also found that the crass language used in the posts would never be tolerated if it were uttered in the workplace even though it wasn’t uttered there.

Despite the nefarious way this was accessed and the fact that it was private, the discharge was upheld due to the coarse, profanity laced language used.

Focus was on the content and not so much on concerted activity or the way it got to the ER – poll audience.
A deputy posted on a public webhosted using his own Twitter. He also posted under his own name and ID on Facebook.

Posts read as follows: “She’ll have that [i.e. the money from the settlement] spent in 6 months on crack cocaine. I hope she loses all her State and County Aid now that she has this cash. 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.”
Rice County and McBroom

- There was 0 evidence that the woman used crack or cocaine
- Deputy did not read the entire story
- Lied to the reporter about his ID
- Posts went viral – sheriff's office deluged with angry messages
- Deputy demoted. Demotion upheld under Pickering and Garcetti and policy violations
Rice County and McBroom

- Posts were not as a private citizen on a matter of public concern.
- They were simply insulting and his identity as a deputy was readily known and public.
- The Court in *McBroom v Rice County* 66-CV-18-2288 (MN 3rd Judicial District 2019) affirmed the award and the demotion.
Little older case – teacher at the Jobbie nooner festival

Is consent required?

What happens now?

Teacher was eventually reinstated but after months of uncertainty and lost pay.
HOW DID THE ER GET THE INFORMATION? IT MIGHT MAKE A DIFFERENCE

- Under the Stored Communications Act, SCA, and others, the way information is obtained may render it inadmissible and may result in liability for the ER – fruit of the illegal tree?

- Should an arbitrator exclude the evidence, and perhaps an ER’s entire case, if it appears there was a violation of federal law in the way in which it was obtained or came to light? – See *Vista Nueva* above.

- Quare; if it is that hard to see, who saw it?
EE had a blog where posted critical comments about Mgt. and the union and concessions made during negotiations.

- Was a private blog and users had to log on using passwords etc. and a consent form not to disclose the contents.

- ER Vice Pres. accessed it using another person’s name – was clear fraud. Did not register or sign the consent form.
EE discovered it and filed suit under the SCA, Stored Communications Act

Court held that the SCA applies to these communications and the import is that if someone accesses Facebook etc. through nefarious means, might mean it is inadmissible

Quare, does that really mean that a threat to kill someone is inadmissible?

Also, how nefarious is nefarious? Is it any unauthorized access or true fraud of some sort?
If the information is gotten through a “friend” or if the “friend, sometimes called a “frenemy,” it loses protection under the SCA and is admissible

EE had 300 friends on Facebook and posted to their “Walls” as well.

One of he friends saw her post and forwarded it to the Employer.

The Employer did not initiate this and simply received the message from the friend
In response to a tragedy at the Holocaust museum in DC, the EE posted in part:

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
EE filed a complaint with NLRB after she was suspended.

NLRB found no privacy violation since it came from an authorized friend on her Facebook page.

Court also rejected the claim under the SCA. Clear that Facebook posts are covered by the law but that no privacy violation occurred on these facts.

“User exception” to the SCA allows access where “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.”

No coercion shown – as in Konop, supra.
SOME EVIDENTIARY ISSUES

- Can ER prove the information is accurate – did they get it from the “right” Facebook – likely but may require proof if the employee denies the message is theirs.

- Was the information really illegally obtained? Does it require a determination of that or are we going to have to make that call in order to determine admissibility?

- As noted above, how nefarious does the act have to be? Does “little” bit of deceit without any coercion count? See, *Vista Nueva* above. No coercion, but the information came through an unauthorized person.
SOME EVIDENTIARY ISSUES

- Does it matter how the ER got the information if the message is truly dangerous, i.e. threats or discloses a trade secret?
  - Can ER require you to provide Facebook passwords?
- Is the message really the most important thing even though the Union will assert a violation of law and due process?
- Elkouri sums it up as that arbitrators are split on the evidentiary value of this and that each case will depend on its facts — go figure
Evidentiary issues

What if the evidence was wrongfully obtained?

1st – was it really? How tell? Frenemies or a co-worker or ex-spouse?

2nd – is there “really” any expectation of privacy on the Internet?

3rd – what expectation of privacy is there? IS it the same as breaking into a locker on the ER’s premises? Quon suggests it’s not if the device is ER owned.

U will argue that there is; Mgt will argue that the formal rules do not apply – the question seems to be how reliable is it and whether there was some expectation of privacy that was violated somehow.
In *AirTran and Assoc. of Flight Attendants*, 131 LA 254 (Goldstein 2012) the arbitrator was faced with a variety of threatening and very abusive posts about co-workers by a flight attendant.

ER had a policy on blogging and prohibited threatening or disrespectful comments or acts.

Grievant posted a series of Facebook posts calling the scheduling dep’t assholes and said flatly, “they are F’g dead!!”
The ER argued that these were threats, plain and simple and should be punishable. Imposed a 3-day suspension and warning of termination.

Union argued that the posts were private and that there was no clear threat.

Union also argued that the posts did not specifically mention the airline or any specific employee.
Arbitrator rejected the claim that posts were private. Grievant allowed access to friends, many of whom were employees. Thus lost expectation of privacy.

Rejected the claim there was no notice. Ruled that the ER’s rule itself placed EE on notice.

Ruled that the content was a threat and that this clear threat was clear violation of the ER’s rule.

Denied grievance.
May not make much difference if the posts are directed at ER’s customers, or the ER’s products.

If there are threats may not make much difference either – once they are discovered does it really matter how?

It may thus be the message as much as the medium. Parties may raise issues of concerted activity, privacy, free speech and other evidentiary issues if the message violates a clear and reasonable rule we are left with the standard just cause analysis.
IS IT THE MESSAGE OR THE MEDIUM?

- Obviously a social media post is seen by more people and perhaps more quickly than other types of messages – i.e. newspaper, radio or TV
- Does that make it “worse?” ER may have more harm done if goes viral.
- Appears that it is a bit of both
30 states have legalized MJ to some degree – either for recreational use or for some limited medical purposes – see list NHTSA

Attitudes toward MJ are clearly changing and continue to evolve as time goes on

Lots of those are in the materials but it is still illegal under federal law and in many states, just having it gets you in trouble. Illegal federally.

The question is – does it get you fired?
WHEN IS TESTING PERMISSIBLE

- SAFETY SENSITIVE POSITIONS
  - NTEU v Von Raab – safety sensitive testing is permissible
  - What constitutes a “safety sensitive position” may be a fact question for an arbitrator – unless there is an agreement by the parties.
  - Is a mandatory subject of bargaining
  - Probably still safety sensitive even if not acting in that capacity at the time of the test
Reasonable suspicion

- Also a fact question – what evidence was there of impairment or use?
- What does ER policy say?
  - Post WC claim? Drug use may be a defense
  - Discharge of firearm or other event. Check policy
- UPS - EE refused job because he was “too sick” – No reas. suspicion
- Lane County - EE was tested when other EE’s smelled strong odor of MJ on his clothing
- Ocala Fla - tested all EE’s who had access to a vehicle in which MJ was found
Random testing – most controversial

- Pre-emptive deterrent to drug use
- This is more difficult to do and usually is reserved only for safety sensitive positions unless there is an agreement otherwise. Von Raab case allowed it for armed EE’s
- Elkouri - requires showing of special need. 8th Ed at 16.2 A
- State laws vary for public employment - Elkouri
  - AZ viol’d 4th Amend. Firefighters Odd safety sensitive
  - FLA & OR – same result juvenile worker
Random testing Private sector

- Focus is not usually on 4th Amendment and whether the test is an unreasonable search and seizure but rather whether there is a compelling need for the test in the particular circumstances.

- Cases go both ways – some arbs. Uphold the right in order to ensure a drug-free workplace. Others find that privacy interests outweigh the ER’s need to provide drug-free workplace and balance the two interests.

- Very fact-specific cases – may depend on how safety-sensitive the job is.
What is “Impaired?”

- BL – not completely clear with MJ/THC
- Some states have est’d per se levels – do they apply to JC analysis? May not
- What evidence of “field sobriety?”
  - Slurred speech, impaired judgment, impaired motor skills, smell of MJ smoke
- ETOH general consensus: .08 BAC = impairment – due to chemistry of ETOH – ETOH water based – gone in 24-36 hours
- Tetrahydrocannabinol, THC, is different – stays in system for 30+ days – oil/fat soluble
What is “Impaired?”

- What is NOT quite clear – at least from the research I found – is that there is no general consensus among the scientific community as to what level of THC = impairment.

- Appears to be some consensus that 50 ng/mL = under the influence – but does that = impaired?

- BL – the question is whether an ER can set a level and enforce it – I think they can BUT have to justify it under JC analysis – why that level? What science supports it?
What is impaired?

- Other issue is whether the presence of a certain level = impairment that justifies discharge – THAT’S a question for arbitrators – THC can last in the blood long after the impairing effects of it have worn off – see cases discussed below

- ER’s need to show that a certain level really does = impairment and that that level of THC in this particular position is JC for discharge

- May need some expert evidence on that, i.e. what was the level, how would that affect ability to do job, compelling reason for discharge
Impairment

The main questions are thus: what is the “defined cut off” for the level of THC that the ER says constitutes a positive test and therefore grounds for discipline or discharge? Why is it at that level? What’s the science?

Second, if the person is above that level of ng/mL, does that necessarily mean that a person is impaired and unable or unfit to perform their job? That will 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?

There may also need to be a discussion of how and why the position is or is not safety sensitive.

Be prepared to justify the cut off level and to explain in lay terms why that level is important to an arbitrator.
Primer on testing procedures

- EMIT test page 5 usually not used
- Gas chromatography more accurate and detects level and type of drug in the system – generally regarded as accurate.
- Make sure of procedures
  - Chain of custody? ID’d PT? Any evidence of tampering – tape across the top of sample?
  - Urine observed or not? 45 mL?
  - Did EE sign and initial the form?
ZERO TOLERANCE POLICIES

- Harvey Nathan – 0 tolerance for 0 tolerance policies
- Elkouri seems to echo that sentiment - arbitrators find these policies to be problematic at best, because they run squarely into the issue of a showing of need by the ER but also because they run contrary to the notion of just cause. Each case depends on its own set of facts
- See, *Gov’t EEs v FLRA* – if CBA specifically treats drug addiction as an illness that language may nullify a 0 tolerance policy
- BL – prove your case – there was a need for the test, a + test verified by evidence of chain of custody & good science, that the EE was impaired and that the presence of THC justifies the action
OFF DUTY SELLING OF MARIJUANA

- American Comm’l Marine case. P 86
- Must be a nexus between off duty activity and work
- The EE was selling to a co-worker on a lunch break off premises
- Co-worker returned to work with it
- Discharge upheld on basis that drug pushers at work harm everybody
A + test not always = discharge

- Orange County – Arb. Smith ruled that a + test does not always = JC for discharge
  - Were some mitigating facts that were not reported
- Several arbitrators referenced in materials have ruled that “under the influence” as measured by a pre-set limit may create a presumption of impairment but that may be rebuttable
- Kahn decision dealt with ETOH but could be applied to THC – does 50 ng/mL always = impairment? It may not depending on the time elapsed between ingestion and the test.
Arbitral responses

- Standard JC principles still apply
  - Can EE be sent to EAP – especially in light of policies that may require it
  - Is termination for a 1st offense too harsh?
- State laws do not always govern the result – alcohol is legal too but use of it on the job is probably going to get the EE in deep trouble.
- Being drunk or stoned on the job will too. Smoking MJ on the job = FHA – not stray too far from common sense
Arbitral responses – card not always enough

- ER and UAW – Brodsky 2012
  - EE acting erratically and tested was apparently fraudulent – temp not right
  - Card = permission to buy but not use at work
  - Card was false – he got a second one later
  - Discharge upheld – was impaired and then lied about it
  - Main factor was that EE was seen acting erratically and that he lied about the card
UE and ER – Dunn 2016

- EE had a MJ card for pain in his knee
- Was a rule to advise ER if had a MJ card
- Was a mishap at work – EE tested +
  1. Had not told ER
  2. MJ not bought from licensed dispensary
     - Might have been harder if MJ from licensed dispensary
- Removal upheld pending proof that EE was “clean”
Wellington and UAW (2016)

- EE tested + after a mishap at work
  - Testing permissible if caused by EE negligence – fact?
- Level of THC was high
- EE acknowledged that he “FD” up and that he would test “dirty”
- EE was in a safety sensitive position – significant factor
- Discharge upheld
EE was not in his assigned location and was found in a closet; eyes red and smelled of MJ

Was eligible for a MJ card but did not have it at the time – got it later

EE admitted he got the MJ illegally through a friend – see Dunn arb above.

Ruled too little too late. Discharge upheld
Lane County OR case

What does the policy actually say?

Lane County case – OR – rec use of MJ is legal – policy said: Nothing in State law requires the ER to accommodate the use of MJ in the workplace.” IOWs’ you can’t smoke it on the job – simple enough

Next para.: “nothing prohibits use of a drug taken under the supervision of a MD where its use does not present a safety hazard or impair the operation.”

EE smelled of MJ – was tested – reas. suspicion OK

No evidence of impairment. Not safety sensitive

His response – use it every day for prostate cancer

BL – don’t say “can’t” but then say “can.”
The Albuquerque post office case

- Similar in that EE had a medical card for use of MJ
- Not safety sensitive – EE was a mechanic but did not drive vehicles. EE self reported the use of MJ.
- Policy allowed EE to stay on duty where MD recommends use of MJ and it does not adversely affect performance – MD had not done so in this case but policy req’d the ER to ask – and they had not
- No evid. of use or possession on duty
- Significantly, the terms of the policy provided that “where there is evidence of a medical reason for the use of a drug, the test counts as a negative test.”
- Rules used dealt with use etc. “on duty.” 0 evid!
The Santa Fe post office case

- EE had a good record. Was a driver and a safety sensitive position
- EE delivered to federal prison – security measures
- Dog hit on a pipe he claimed that he found on the route! Fired for under the influence while on duty.
  - Vehicle searched, nothing found. Passed field sobriety test
- Also, they lost the pipe – it was never formally tested
- Tested him. Above 50 ng/mL.
- EE admitted using MJ 10 days earlier in CO where it was legal. Test consistent with that. 0 evid. o/wise
- Element of off duty conduct as well – there was no showing of impairment.
The Santa Fe post office case

- EE was reinstated
- Lack of proof of use on duty – which was an element of the ER’s case.
  - Have to prove it! Mere suspicion is not enough.
- Lack of proof of what was in the pipe and lack of proof of impairment even though was in a safety sensitive position.
  - If you have the smoking gun – FCS bring it!
- EE’s lack of forthrightness did cost him but the crux of ER’s case was that he used MJ on duty. He claimed he used it off duty. That coupled with the lack of the pipe and no evidence of impairment = reinstatement
There was no evidence of the metabolic absorption rate – i.e. how long does it take for THC to leave the body?

What are the factors that might affect that? Type of MJ? Body type?

There is a body of scientific evidence regarding alcohol and how long it takes to leave the body.

What is it for THC? Not sure – So tell me
Other arbitral and court cases

- Monterey County and Solana County – 2007 and 2011
  - MJ no effect on business. No erratic behavior. Off duty use

- City of Portland – Gaba – noted Oregon’s lenient approach to MJ and reinstated an EE who tested +

- OTOH – Freightliner Court O/turned decision reinstating EE where the arb. ignored clear language in the CBA – and that was significant – who tested +
  - There the policy was in the parties’ CBA and called for discipline if “under the influence.”
  - They had agreed to a cut-off and for the consequences upon a + test.
Other arbitral and court cases

- Zurn case – EE was reinstated after a workplace accident and who tested + but no evidence of impairment
  - This case is a stark example of the difficulty in defining under the influence vs impairment
- Temple Inland case – again clear CBA language calling for possible termination - not a unilateral policy but in the CBA
Other arbitral cases

- King Soopers 131 LA 29 (Sass 2012)
- EE tested positive on a hair test
- Was reinstated since hair showed past use but not recent use
- Arb. opined that off duty use of MJ, even though still illegal was like alcohol duty and off duty use had little evidentiary consequence.
Other arbitral cases

- Dep’t of Justice, 135 LA 185 (2015)
- EE tested + for MJ and was charged with “egregious” misconduct and fired
- Arb. Reinstated subject to 30-day suspension ruling that there was misconduct but not egregious
Paperworkers v Misco, 484 US 29 (1987)

- Was originally a marijuana case
- Arb. reinstated EE where alleged he violated rule against possession of MJ on ER’s premises
- 5th Cir. Overturned arbitrator
- Supreme Court reinstated arbitrator’s award – drew essence from CBA
2nd hand smoke? Probably not

- Journal of Drug and Alcohol Dependence – found under “extreme conditions” and in unventilated room, 2nd hand smoke may cause a positive test, & minor impairment where exposure lasts about an hour
- The conditions do have to be “extreme”
- Unclear how much impairment is truly caused by 2nd hand smoke
Efforts to rebut + test results

- US Steel 133 LA 907 (2014). EE claimed exposure to 2\textsuperscript{nd} hand smoke but union failed to provide rebuttal testimony that the test took that into account. Unclear if the result would have been different if it had.
  - Was a LCA and EE agreed to remain drug free
  - He was bald at re-test – used underarm hair
- US Steel 134 LA 1196 (2014) Negative test 1 month later insufficient to rebut 1\textsuperscript{st} + test, where there no problems found in the chain of custody or the testing procedures.
Our scope is not to discuss other “harder” drugs but what if the MJ is found mixed in with others

Be prepared to discuss how THC interacts with other drugs – whether they are “legal” or not

EE may be taking prescribed meds and also has ingested THC – upon a + test how might that affect them?
Troubled employees – Common Law of the Workplace

- Might be a defense in some cases if ER knows of the problems and does nothing to assist, especially if there is an EAP program

- Union bears BOP on these issues
  - Did the ER know?
  - What is the EE’s HX? Have they treated before?
  - Not all arbitrators buy into this – see Common Law of the Workplace at section 6.37
  - Some use Std. JC and impose discipline if impaired
  - Others may allow EE to seek rehab as a condition of reinstatement if elements are present
Possession or use on duty is a different level of analysis and may provide grounds for discipline even if the EE is “troubled”

Driving drunk or stoned is a major hazard and might well result in termination
CONCLUSION

- What is the policy on testing?
  - When and under what circumstances?
- What evidence of reasonable suspicion?
- Is the EE safety sensitive?
- Random? 4th Amendment in public sector
  - compelling reason in the private?
  - Why does the ER need the test?
The testing procedure?

- Where was it done
- Who did it? Qualifications?
- How was it done?
- Chain of custody issues?
- Was it done correctly?
- Do you have an expert who can explain it – prove or disprove any of the above?
CONCLUSION

- What is the proof of presence?
- What is the proof of impairment?
  - Is a positive test enough?
  - Do you have an expert to explain in plain language how the test was done and what the results mean?
- What does the CBA or the policy say?
- What is the EE’s history? LCA?
- It always depends on the facts!
OFF-DUTY CONDUCT
IF I LEAVE WORK AND SCREW UP WILL WORK LEAVE ME?

JEFFREY W. JACOBS
ARBITRATOR – PRESENTER
“MISCONDUCT” VS “CONDUCT” – BOTH CAN BE USED FOR DISCIPLINE DEPENDING ON CIRCUMSTANCES. NOT HAVE TO BE ILLEGAL


- NEXUS MUST BE REAL – NOT SPECULATIVE
- SHULMAN QUOTE
- DULUTH CASE – OFF DUTY BUT AT WORK
  - Walking to car, on a break – there as a cust. or EE
STDS FOR MEETING NEXUS

- Caldwell and Elkouri
- 1. Conduct harms employer’s business;
- 2. 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.
STDS FOR MEETING NEXUS

- St. Antoine Common Law of Workplace 6.6:
  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).
NEXUS - DOES CBA HAVE LIST OF OFFENSES/CONDUCT = DISCIPLINE?

- WHAT EXACTLY DOES IT SAY?
- HOW SPECIFIC IS IT?  E.G. SPECIFIC EXAMPLES OR VAGUE “MORALS CLAUSE”
- WHAT LEVEL OF DISCIPLINE IS APPROPRIATE?
- OTHER TYPES OF RULES – RULEBOOK?
- ARE THE RULES NEGOTIATED OR UNILATERALLY IMPLEMENTED?
“NEXUS” - Conduct involving actual or likely potential harm to the business

- Is there actual or a real potential for harm? Requires more than speculation. What evidence is there?

- How significant is it – is it one customer due to an off duty dispute of some sort or is there evidence that the loss will be significant?

- Is there a way to deal with it short of discharge? Re-assignment etc.?
CONDUCT THAT DIRECTLY HARMS ER’S BUSINESS

- FACTORS
  - What was the conduct?
  - How related to work?
    - Toll booth ticket taker and paintball gun example
  - Publicity? What evidence is there?
  - What was the actual or potential harm? Be prepared to show it.
Examples of Conduct adversely affecting employee’s ability to do the job

- The employee is in jail due to off duty charges – how does that affect the job? How long? For what?
  - If out of work for extended period, that affects the job
- The employee loses a license or qualification necessary to perform the job
  - Social worker accused of child abuse and loses certification
  - RN who is accused of child abuse/assault who loses certification to work with VA’s under DHS rules
  - Bus driver who loses CDL due to DUI charges
- Theft charges for delivery driver required to be in customer’s facilities unsupervised. Are there circumstances that mitigate the nexus? I.e. is the theft from a store or a jilted ex-spouse who may be making it up?
Conduct that causes co-employees to refuse to work with the employee.

- What actual evidence is there of this?
- What is the nature of the conduct?
- What actual harm is shown as to why the co-workers do not want to work with the EE? Is it because of conduct or because of status, i.e. they are Muslim etc. The KKK case from 1966.
- Isn’t this the exact reason why the “just cause” standard is in the CBA? I.e. to prevent people who are unpopular from being fired?
Conduct that causes co-employees to refuse to work with the employee.

- Do the co-workers just not like him? What evidence is there why?
  - Dakota Cty. - guys were picking on EE because he was a nerd. Thought he’d sue them.

- AIDS – disease not generally grounds for discharge

- Other Dakota – pot grower case – court and law enforcement not trust her – 1 factor of many

- KKK case – was a showing of actual and potential harm – boycott of bus service.
OFF DUTY ASSAULTS AND THREATS

- Off duty assaults/threats toward others
  - Police officer assaulting a wife or bar patron
  - Teacher harassing someone in the community
  - How public is this? What harm can be shown?
  - Minneapolis case cop - gets into fight after drinking – showed remorse, rehab and that he got the alcohol from the Department. Was public.

- Factors: How much and nature of publicity?
- Did public associate the conduct with the ER?
- Nature of employment? Did assault affect job?
OFF DUTY ASSAULTS AND THREATS

- Off duty assaults/threats on co-workers
  - Circumstances – what evidence is there of a nexus to the work or is this entirely unrelated – i.e. is it about a work dispute or is it a fight over a debt or a woman etc.
  - St. Antoine – fight related to work vs. fight unrelated and EE’s not see each other
  - USPS case – the road rage case
OFF DUTY ASSAULTS AND THREATS

■ PRACTICE TIP:
  ■ MAKE CLEAR THAT POLICY AGAINST THREATS OF ANY KIND WILL NOT BE TOLERATED AND WILL LEAD TO DISCIPLINE—NOT JUST 0 TOLERANCE
  ■ PROVIDE EXAMPLES OF HOW IT’S ENFORCED
  ■ TRAINING EXAMPLE – PPT IN ORIENTATION – IF YOU DO THIS YOU WILL BE FIRED – DRUG OFFENSES, THEFT, ETC.
Off duty harassment - find the page for this

- What is the nature of it? How connected to work?
- Examples – bus driver harassing young girl
- Phone repairman making calls to a customer
- Factors – need to maintain public confidence. Need to ensure honesty and integrity – be wary of general statements about that – how specific do you really need this to be?
Conduct that harms employer’s reputation

- Criminal matters – is the EE simply unavailable for work?
- How much public notoriety?
- Clear cases – teacher accused of porn charges or child abuse (But Bergquist case requiring showing of publicity), cop accused of assault or DUI, accountant accused of fraud
Conduct that harms employer’s reputation

- Some employments carry higher standard of trust – police, teachers, EE’s entrusted with money or work with VA’s - higher std. of conduct and of greater discipline for certain offenses.
  - HSSA and Dakota drug case again – probation officer!
- Not so clear cases – dock worker in a fight after work. DUI offense for someone who does not need to driver as a condition of employment.
- Requires more than speculation or general statements about “our company culture” or offending somebody’s tender sensibilities
Conduct that harms employer’s reputation or business - DRUG CHARGES

- Drug free policies – what do they say? How have they been enforced?
- What is the nature of the employment? Is there a showing that the charge will adversely affect the operation or relationship with customers?
  - BARNER—the offense presented potential PX - 17#’s!
  - SCHNUCK (Suardi) – warehouseman in store.
- How much notoriety was there?
  - Will depend on the nature of the work and the nature of the charge
DRUG CHARGES

- Practice tip: Was there evidence of how the drug charge is actually related to work; not just that it is distasteful.
- Is this a safety sensitive job? Is this being overstated?
- Is there a federal/state law that impacts the charge – truck driver or dangerous employment – nuclear plant etc.?
PRACTICE TIP

- A DRUG FREE WORKPLACE POLICY FOR ON DUTY CONDUCT – MAY NOT APPLY TO OFF DUTY CONDUCT

- ARBITRATOR MAY VIEW OFF DUTY USE DIFFERENTLY FROM OFF DUTY SALE OF ILLICIT DRUGS

- LANE COUNTY OR CASE
Conduct adversely affects ER’s operation

- **DRIVING OFFENSES**
  - Nature of the offense – loss of license?
  - Nature of the work - how much driving does it entail? Possible accommodation?
  - DUI Offenses – may be treated more harshly but depends on nature of the employment
  - Higher standards for certain employments – i.e. police, professional drivers etc.
    - Teacher? Likely not unless it’s a driving instructor
    - But CF – publicity discussion above
CONDUCT THAT OFFENDS THE EMPLOYER OR IS DISLOYAL

- Working for a competitor
- Divulging confidential or sensitive information while off duty
  - Examples: HIPAA; educational data; investigative data; product or manufacturing info; marketing strategies.
  - This conduct may or may not be illegal or subject the EE to criminal penalties (even though there might be civil consequences) but may also certainly be subject to disciplinary consequences.
Disparaging the employer or its product

Conduct the ER is morally or morally opposed to – i.e. social service agency EE who supports a candidate who proposes cutting funding for that agency – may require a greater showing of actual harm.
CONDUCT THE ER JUST DOESN'T LIKE

- KKK EXAMPLE – but here was a showing of actual harm - boycott
- Belonging to a political group the ER finds offensive – may be free speech and privacy issues here
- However, less freedom in the private sector. See St. Antoine’s work on this.
DEFENSES TO DISCIPLINE
DISCHARGE CASES

Page 108
This is about defenses to any disc. Case

NB – there are defenses to specific types of cases – i.e. insubordination, poor performance, safety, off duty conduct, etc.

Unions can always attack the case on the basis that there is insufficient proof of a required element of just cause.

U can argue that one or more element is missing
Burden of proof

- While this is not a “defense” it may be a way to defend the case – by requiring a high degree of proof
  - Preponderance – 50 + feather
  - Clear and convincing – a lot more
  - Reas. Doubt – not used usually even in serious cases.
DISCIPLINE/DISCHARGE CASES

- The 7 tests – how often are they used?
- Need to know what ER has to prove to defend
- NOTICE
- Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
#1 – NOTICE

- CONSISTENT – was there a consistent message? Lax or spotty enforcement? Have others done it and gotten “away” with it? Was there a contrary message sent?
- Was it UNDERSTOOD by the employee?
  - Language/context?
  - Consequences of violating the rule clear?
  - 0 Tolerance? How is that explained?
Arbitrator wants to know that there was clear notice to the employee that certain behavior would be disciplinable – can be thru progressive discipline, evaluations or coaching sessions.

If there is no notice = defense

Not all conduct needs formal notice – Any damned fool rule
#2 - RELATED TO ORDERLY, EFFICIENT OPERATION OF THE WORKPLACE

- On duty rules – are they reasonable?
  - Is there a difference between a negotiated rule vs. one that is unilaterally mandated?

- Off duty rules – Nexus
  - Differences in types of jobs – e.g. warehouse workers vs. police officers
  - Differences in types of offenses or conduct
#3 – Investigation *before* discipline?

- Have to discipline for what you know at the time of discipline – NOT afterward
  - ER can take its time – unless CBA limits it
  - Possible exceptions for evidence acquired after the discipline – is it a new ground or new evidence of the pre-discipline conduct?

- Was the employee given an opportunity to explain what happened? – (Loudermill)
#3 – Day in Court – was the EE given a Chance to explain?

- Was it done BEFORE discipline?
  - Who did it?
  - Was there any “other” motive? Can U point out personal issues or other reason for the charges?
  - Doesn’t need to be perfect – not a witch hunt – was discipline a foregone conclusion?
  - Who did the investigator talk to? Everybody, or just those who gave favorable info?
Was it fair and objective

- Was the person doing the “investigation” the same as the charging person?
- Was that person the prosecutor, and witness, judge and jury?
  - The same Mgt. person CAN Be both judge and jury but it may be best not to be and have a 2\textsuperscript{nd} set of eyes
- Was the entire file reviewed?
GUILTY OR NOT

- Burden of proof – how much is enough?
  - May depend on type of case – attendance – rules violations vs theft/cardinal offenses

- Circumstantial vs. direct – Is one better?
  - Eyewitness testimony – how accurate is it?
  - What inferences can be drawn? What’s more reasonable and is there more than one?
  - If 2 equally plausible explanations – 1 proves guilt. Other proves innocence. Party w/BOP loses
PENALTY

- Related to the seriousness of the proven offense? – Did ER prove ALL allegations?
  - What does the rule or CBA say? Matrix?
  - Is the disc. corrective or punitive?
  - Was it progressive?

- Related to the EE’s length of service?
  - Long term EE’s with good record v short term EE with a mediocre record

- Can ER explain the level of discipline?

- Arbitrator’s discretion. How much?
GENERAL DEFENSES TO DISCIPLINE

- DISPARATE TREATMENT – some discretion is OK to avoid rigidity but everybody has to be treated the same
  - This is closely related to lax enforcement but is based on the notion that EE’s were treated differently for the same or similar offenses
  - How similar are the facts?
  - Investigate the past disciplines
Lax Enforcement

- Todays favors = tomorrow’s demands
- How prevalent was the enforcement or lack of it?
- Inconsistencies in enforcement of the rule
  - Different supervisors or locations in same unit
  - E.g. – seat belt rule – did ER just admonish and suddenly start disciplining people?
  - Did ER post a new rule – no more laxity?
POOR INVESTIGATION

- Did ER miss significant facts?
  - The fired fish investigator
- Did they even talk to the grievant?
- What assumptions were made?
- Did the ER talk to only those people it thought would incriminate the GR?
- Was discipline a foregone conclusion?
Double Jeopardy

- Once discipline is final cannot be increased
  - Is it final?
  - Can be “suspension pending investigation”
  - Can also use prior discipline to justify a new, separate penalty for a new separate offense

- #120 and AMPCO – EE suspended for refusing a drug test – given a final discipline that the ER wanted to increase later. Classic double jeopardy
DEFENSES – TO PENALTY

- LENGTH OF SERVICE
  - Longer term EE’s vs. short timers
  - Bank of good will – but may not save them from all offenses. Should they know better
  - Work ethic and competence. EE correctible

- POST TERMINATION CONDUCT
  - Shows remorse or rehabilitation
  - Be careful, may be double edged sword, especially if the EE has NOT done things right. City of Fridley, where EE claimed he was doing well after a DUI – but he wasn’t.
Defenses to penalty where some discipline is shown

- GOOD WORK RECORD & EVALUATIONS
  - May not excuse outrageous behavior but arbitrators give preference to better record
  - Is the EE really bad if they have 4’s & 5’s on evals for 10 years?
- PRIOR DISCIPLINE – What is it? How old? Was the EE corrected or is this a recurrence?
  - Is there a CBA exclusion period; what does it say?
  - Be careful not to open door by alleging good work record – may allow stale discipline in
The CBA had a curious clause 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.”

Even though serious misconduct, the EE had to be reinstated but w/o back pay
DUE PROCESS ISSUES - Witness statements and documents

- American Baptist Homes d/b/a Piedmont Gardens, 359 NLRB #46 (2012) & 362 NLRB #139 (July 26, 2015)
  Board o/turned Anheuser-Busch, 237 NLRB 982 (1978)
- A balancing test that can allow disclosure of statements
- U’s need vs ER’s need for confidentiality
- Will there be prejudice to witnesses – I.e. interference?
- Can witness be protected?
- Was there a promise of confidentiality? Other promises made to the witness to induce testimony?
- Unions should ask for these so they have everything
Witness statements and docs

- BL – may not be a defense if ER w/holds info but ARB may think ER is hiding something
- U should get all documents to be sure they have them all and to provide info on other possible defenses
NLRB v Weingarten, 420 U.S. 251 (1975)

- EE has the right to union representation in any interview where discipline may be implicated.
- EE must make the request
- ER must grant the request, refuse and stop or give EE choice to go ahead or end interview
- If EE asks if need U rep and is told no – ER may not be able to use the statements for discipline – St. Thomas and IBT #120
- Check to see if this was done correctly
Garrity v New Jersey 385 U.S. 439 (1967)

- Generally for law enforcement
- Rules - Order the officer to answer 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, &
- Advise the officer that the answers to the questions will not be used against the officer in criminal proceedings.
Cleveland Board of Education v Loudermill, 470 US 532 (1985)

- Must give EE chance to explain heir actions BEFORE discipline is taken
- Not have to be much and the ER can after hearing the EE issue discipline right afterwards but don’t miss this step
- One ER did and when EE asked to explain, he was denied and told he could do it at the arbitration. Wrong answer.
The troubled employee

- Not see this much, but St. Antoine and others say you can –this is more than a sob story – there is an analytical basis under just cause

- Defined as an EE who is addicted to drugs/alcohol or has serious mental illness

- Union has BOP, but can be valid defense, IF you have the necessary evidence to prove it

  1. Does the EE meet the definition? Merely being stressed or drinking is not. Is there a DX that EE can’t control their actions? Did the ER know about it?

  2. Did the addiction cause the actions = discipline
Addiction alone is not grounds for discipline, ADA may prohibit it anyway but arbitrators follow suit.

Can the ER show there is a safety reason not to allow the EE to continue in any capacity or that the absence of addiction is a pre-requisite of the job, i.e. a CDL or other license requirement? Is there no other job the EE can do?

Possession or use on the job is a very different analysis and may get the EE disciplined.
MGT ALSO AT FAULT

- Usually involved in some sort of assault or insubordination claim
- Question is whether the ER or supervisor was also engaged in the same conduct or instigated the action?
  - Did super. Start the “fight”? Taunt the EE?
  - Was supervisor given same penalty – disparate TX
- Fact specific
WHAT’S THIS MEAN? - USE OF CONTRACT LAW PRINCIPLES TO INTERPRET LABOR AGREEMENTS

MONTANA BOPA CONFERENCE 2021
Introduction

- We will explore the standards arbitrators use to decide labor contract disputes – they are not like “regular” contracts
  - What theories exist to aid interpretation?
  - What interpretive devices and standards do arbitrators use?
  - How does past practice work?
  - This is not about how to negotiate a contract but how to negotiate one so when there’s a dispute you can convince me you’re right
PRIME DIRECTIVE - INTENT OF THE PARTIES

- What did *parties* intend when they wrote the CBA, not when the grievance was filed or what their lawyer says at the hearing?
- Sometimes parties leave ambiguity for a reason to get a “deal” - or knew it was a problem but let an arbitrator deal with it.
- Negotiating a CBA is *very* hard work.
- Parties are presumed to know every word and every practice – is that realistic?
COMPETING THEORIES

- RESERVED RIGHTS THEORY
  - What’s mine is mine and what’s yours is mine unless I specifically gave it to you
  - Question is thus not whether the CBA allows it but whether the CBA prohibits it.
  - Work rules – ER can create them but they are not contractual. Generally subject to the grievance procedure and/or just cause provisions.
COMPETING THEORIES - IMPLIED OBLIGATION THEORY

- Union’s generally use it
- If you didn’t put a King’s X on it, we can still claim it. In other words, unless there as specific negotiation about it or an express waiver of it, the practice or benefit remains in place and cannot be changed unilaterally
- Practices and benefits in place stay in place unless negotiated away
- Not likely the prevailing view but it is an argument that can be used.
MUTUAL ASSENT

- Is there a CBA if there’s a dispute?
- Yes, under common law if there is no meeting of the minds there is no contract
- Elkouri notes, the grievance process is for this very purpose
  - St. Francis case – ER argued that there was no CBA since there was a dispute and it not have to pay the casuals as the CBA said.
OBJECTIVE VS. SUBJECTIVE APPROACHES

- **Objective** - the meaning of the words used is that which would be attached to it by a “reasonably intelligent person”
  - Focuses on dictionary definitions
- **Subjective** – Focus on the intent of at least one party as manifested by him/her
  - What did *they* say they thought it meant?
DIFFERING APPROACHES TO CONTRACT INTERPRETATION

- Parties’ mental processes are not relevant but outward manifestations to the other party are – secret intentions don’t count
- Arbitrators use a mixture of dictionary definitions and the parties’ intent as expressed in bargaining – i.e. what do the words mean and what did the parties manifest or say they thought it meant
If the language is clear, no more analysis necessary.

- Saying “it’s ambiguous” doesn’t make it so
- Patent ambiguity – on its face
  - E.g. “whenever possible,” “reasonable efforts” etc.
  - 2 Clauses are in direct conflict with each other
- Latent ambiguity – ambiguous in context
  - What is chicken? Guaranteed for “life.”
  - “All employees,” can mean different things in different contexts
PAROL EVIDENCE RULE

- Common Law: prohibited discussions leading to the formation of contract from being introduced to interpret the language – the language itself was all important

- Labor relations: Not so. Bargaining history, prior discussions and even discussions during the life of the CBA can be helpful and are generally admissible.
BARGAINING HISTORY

- This can be VERY important evidence
  - What did the parties say to each other?
    - What was the response by the other side? Silence can be assent
  - Who wanted what, when?
  - What was the progression as the disputed clause “morphed?”
  - Why is this here? Is it in response to a particular situation or need? What was the underlying reason for inserting it?
BARGAINING HISTORY

- Clauses rejected or withdrawn - Did they get what they wanted?
  - Careful what you ask for; you might not get it

- General rule: you cannot gain in grievance what you could not gain in negotiations
  - Be careful proposing language to “clarify” what you think you already have. If you have it, why ask?

- KEEP GOOD NOTES! When were proposals made, who made them, how did the clause change & discussion Re: “meaning” or how it would be applied
RULE #1: words most nearly related should be placed in the sentence as near to one another as possible.

- What do the clauses modify? What modifies them? Do you have to diagram the sentences?
- Are they in the same section? Same paragraph? Same sentence?
INTERPRETIVE RULES

- Giving words their “normal” or “technical” meaning.
- Examples of normal meaning: “shall” is mandatory, “may” is discretionary.
- Technical terms or those unique to an industry must be explained:
  - “Deadheading” means different things in different industries
  - “day” & “week” may mean different things
SOME INTERPRETIVE RULES

- Are the meanings consistent throughout the contract?
  - Are words the same – if so likely to be given same meaning
  - Are the words different – if so likely to be different meaning – hours worked vs hours paid
SOME INTERPRETIVE TOOLS

■ Prior settlements – are they based on facts presented or did they set precedent?
  ■ How close are the facts?
  ■ Lots of reasons to settle may not be precedent

■ Prior arbitral awards – has anything changed?

■ Interpretation in light of existing law
  ■ Parties presumed to intend a lawful contract
CBA language must mean something

- Austin, MN – Clauses at odds with each other
- “When the date of hire is between July 1st and October 1st, credit for 1 week will be given on the following January 1st.”
- After 1 year of service, the employee will receive 2 weeks vacation on anniversary date.
- City – clauses negated each O/
- Union – first dealt with 1st week – 2nd dealt with accruals after that
- Ruling gave effect to both clauses – EE gets 2nd week on anniversary date
SOME INTERPRETIVE RULES

- Expresio exclusio - Specifically listing one thing or a set of things excludes others.
  - If there is a specific list of items, implication is that other things were intentionally excluded
  - I.e. – theft, fraud etc. = termination, but list not include attendance. Attendance is not on the list

- Ejusdem Generis – of the same kind
  - Related to above – a specific list of certain things excludes things that are unlike those
SOME INTERPRETIVE RULES

- Noscitur a sociis - known by association
  - A bit esoteric but characterized by how the terms interrelate to each other
- Construing language against the drafter
  - Contract Law 1001 – may not apply well in labor relations since the language may have gone through several iterations during bargaining and it may not be obvious who “really” drafted it
SOME INTERPRETIVE RULES

- Avoidance of harsh or absurd results
  - Very fact dependent

- Avoiding inconsistency with prevailing law
  - If the clause is found to be contrary to law
    the arbitrator may not enforce it
  - Savings clauses exist for this very purpose
  - Inconsistencies in the law? i.e. marijuana. States legalized it but still illegal under federal law. Comes down to ER’s policy
SOME INTERPRETIVE RULES

- Specific versus general language
  - The more specific the language the more applicable it may be to a specific situation.
  - General management rights clauses vs. specific benefits clause in the CBA.
Avoidance of a forfeiture

- Arbitrators generally do not interpret language as to work a forfeiture of a benefit granted under another provision.

- Parties are generally assumed to know their CBA and not to negotiate a provision that negates another one.

- Arises in the context of grievance procedure – miss time line = grievance waived.
MANAGEMENT’S RIGHTS –
Jeffrey W. Jacobs
Arbitrator
BOPA 2021
OVERVIEW

- Not discuss mandatory or permissible subjects of bargaining

- Residual or “inherent” rights – unless there is a provision in the CBA that limits/prohibits them, the employer generally reserves all rights not otherwise bargained away in the CBA.
PUBLIC SECTOR OVERVIEW

- Same general rule as private sector

- Check the State statute – some define management rights & include them in CBA

- Despite the statute, these rights can still in most cases be limited by the CBA – any limitation must draw “essence” from CBA
Management’s rights

- Quare: If all rights are reserved except those specifically negotiated away, is one necessary?
- May be a difference of opinion but generally, yes, it’s always a good idea to have a specific provision outlining what is not subject to grievance and what is therefore retained by management.
MGT RIGHTS CLAUSES

- Do you really need them?
- Most CBA’s have them
  - Most are, of course, “subject to the specific provisions of the CBA” – Quare: are there limitations in the CBA? Can they be implied?
  - Specific reservations of rights beyond general mgt rights clauses – scheduling and assignment of employees
  - Specific clauses > general clauses
OPERATIONAL METHODS

- Generally left to management to determine what to produce, how much, when and the methodology

- Generally management decides who is to do the work unless limited by CBA
  - The 300 volt example – the MOU was old but still in effect
CHANGES TO WAGES

- As operational methods change may need to adjust wages – very fact specific
- Arbitrators have somewhat more discretion – unions need to provide proof that a wage change or adjustment is appropriate though. Is the job “new?”
- Does CBA require negotiation over creation of new wage rate/class?
Mgt generally gets to determine production standards & quality/quantity and to enforce them through discipline

Subject to just cause provision – is rule reasonable?

- Did ER provide adequate training, equipment, time, support?
- How compare to other EE’s performance?
TECHNOLOGICAL CHANGES

- Management gets to determine the technology and decides when to upgrade/change it
  - May be limits in the CBA in terms of retention of employees or the effects of such a change
  - May be subject to seniority; reduction in force; recall; severance provisions
COMBINING JOBS; REASSIGNMENT OR ELIMINATION OF JOBS

- May be tied to technological changes
- Economic changes/customer needs
- Provisions requiring retention of certain employees – e.g. foremen or brakemen on locomotives, provisions on size of crews, safety provisions requiring certain employees to be on site?
TRANSFERS OF WORK

- ER is generally allowed to combine jobs or transfer work from one classification to another unless there is a restriction in CBA.
- Provisions delineating the work to be done by certain EE’s? Jurisdiction provisions? Recognition clauses setting forth the work to be done by bargaining unit EE’s?
- Job descriptions as limitation? Was it negotiated?
HIRING

- Generally always left to management – rare that there are provisions limiting the ER’s right to hire
  - Recognition clause with requirements for licensure – police, teachers, tradespeople
  - Requirement that must be taken from a hiring hall
  - Seniority/recall provisions if EE’s on layoff – may have to rehire laid off workers first
MARKET CONDITIONS

- Does management have the right to change matters that are otherwise limited by the CBA because of changed (even radically) market conditions?

- Generally, no. If the CBA requires something, mere market forces are not enough to warrant ignoring or overlooking it.
SAFETY ISSUES

- Management generally gets to determine what safety measures are required
  - Size or make up of crews – is there a CBA provision? Is it really an unreasonable safety hazard?
  - Inherently dangerous jobs

- Discipline for failure to adhere to safety standards – subject to just cause
SCHEDULING

Without a CBA provision, ER retains discretion on when & how to schedule employees

- Overtime provisions
- Crew size provisions
- Provisions against “arbitrary or capricious” action – how high is that bar?
Without CBA provision ER can generally schedule overtime or can schedule so as to avoid overtime

- Some cases can restrict this if ER action truly “unreasonable” but rare and must find a basis in the CBA
- Example – there was plenty of work. Pipefitters case
- OT assigned to the “wrong” EE’s – is there a $ penalty?
Assigning work within a defined work day

ER’s argue that have the inherent right to do this and unless there are more than 8 hours/day or 40/week no overtime or premium pay Unless CBA provides otherwise

Quare: What if a clause calls for additional pay for hours assigned beyond the “regular” day? Does this require extra pay if there are extra *duties* or only if extra *hours* per day?
OVERTIME

- Obligation to equalize overtime – what does the CBA say?
  - Is there a CBA provision for division of O/T?

- Obligation to be “reasonable” – may be implied but still must be tied to the CBA in some way
SUBCONTRACTING

- Arbitral difference of opinion – Mgt right in absence of CBA clause vs. implied limit if done in good faith
  - Union security clauses/recognition clauses may provide a limitation on subcontracting
- Balance of right to operate the business efficiently against union’s interest in preserving the unit
Factors that may be considered

- Is it done in good faith? Whatever that is
- Past Practice – ever done it before?
- Justification – why do this? Emergency?
- Effect on the unit and employees – minimal or undermine it? How many displaced?
- Type of work – normally done by unit EE’s?
- Are there enough unit EE’s to do the work?
- Availability of tools/equipment
- Regularity and duration of subcontracting
- Negotiation history – ever talked about this?
ASSIGNING WORK OUT OF UNIT

- General rule - Mgt right to assign work to of unit unless CBA provision limiting it
- What does the CBA say regarding definition of the unit or work jurisdiction?
- Similar to subcontracting in absence of CBA provision – done in good faith or to undermine the unit?
FACTORS THAT MAY BE CONSIDERED

- Quantity of work to be assigned? De minimus or will it undermine the integrity of the unit?
- Is it supervisory in nature?
- Is it for a short time/special need?
- Has it been done in the past?
- Is it really “unit” work? Have others done it?
- New technology?
- How strong is recognition clause?
Strategic Alliance - bargaining work will not be outsourced except in extraordinary circumstances.

- ER: market conditions constituted "extraordinary circumstances"
- Union: "extraordinary circumstances" was only that they could do the work cheaper with outside contractor
WORK RULES

- Little question that the ER has the right to establish reasonable work rules
  - Are there any restrictions on certain types of conduct in the CBA?
  - Issue is generally the enforcement of these
    - Zero tolerance policies – are they really?
    - Rules must be “reasonable;” but hard to refute
    - CWA and Frontier FMCS 04-54818 (Jacobs 2005) – the ER has the right to promulgate reasonable safety rules
DRUG AND ALCOHOL POLICIES

- ER is generally allowed to promulgate such policies if related to work
  - Reasonable suspicion testing – what are the rules? How enforced? What are the facts?
  - Random testing – subject to greater scrutiny
    - Safety sensitive positions
    - ER should be prepared to show why need random testing
  - Just cause provision still likely applies
CELL PHONES

- Public transportation
- Railroads
- Clear that management can promulgate rules regarding the use of cell phone but discipline may still be subject to just cause
- Does the CBA call for certain discipline for violations? If so, arbitral discretion is limited
NO SMOKING POLICIES

- Generally upheld as long as reasonable
  - Restrictions on distance from facility – past practice allow smoking in designated areas if there are such places

- Restrictions based on health and safety

- Restrictions based on health insurance
ATTENDANCE POLICIES

- ER can generally promulgate them as long as not in conflict with CBA
  - No fault policies – are they in conflict with just cause provisions?
  - Sick leave provisions and attendance polices – are they consistent
- Negotiated attendance policies – generally have more weight
SENIORITY CLAUSES

- Two types – strict seniority
  - Seniority is the sole factor in determining employment decisions listed in that clause. The ability of the EE is not relevant
  - Seniority covers a large number of issues but most typically in promotions

- Modified seniority – three general types
  - Relative ability
  - Sufficient ability
  - Hybrid clauses
RELATIVE ABILITY CLAUSES

- Comparisons between qualifications of employees are necessary and proper, and seniority becomes a determining factor only if the qualifications are equal.
- Is the junior EE “head and shoulders” above the senior EE?
- Depends on job requirements, training, education, experience & special knowledge.
Minimum qualifications are enough under these sufficient ability clauses.

If the senior employee can do the job, that EE gets it.

Relative ability or the fact that a junior person might be “better” qualified is not relevant.
HYBRID CLAUSES

- These clauses require 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,’
Burden of proof issues

- Depends on the clause, but if it is a relative ability clause, the union typically bears the burden to show that the qualifications were not “equal” therefore the senior person gets the job.

- Some also impose a burden on the union to show that the ER’s determinations were biased, arbitrary or capricious.
PAST PRACTICE

- What it is –
  - 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. – Mittenthal
  - Consistent response to a recurring set of circumstances that is regarded as that which is required by the parties
  - Is it like the sun rising or lightning striking?
PAST PRACTICE

■ What it isn’t
  ■ One time occurrences may not count
  ■ Mere failure to grieve things may not count as a binding past practice (but may be evidence of contractual intent)
  ■ Exercise of managerial discretion even if longstanding & consistent may not be a binding past practice
    ■ You always granted vacation when we wanted it!
PAST PRACTICE

- What can you do with it?
  - Provide rules for things not in the CBA
  - Proper interpretation of unclear CBA language
  - Show that even clear CBA language has been amended by mutual action or agreement – (Note that there is something of a difference of opinion on this one)
ELEMENTS OF PAST PRACTICE

- Clarity & consistency – has it been the same response? Was it unequivocal?
- Longevity – how long has this been going on?
  - Was it over the course of several bargaining rounds? Parties presumed to “know” practices
- Repetition – how often has this happened & have the circumstances been the same or have they changed?
- Mutuality & acceptability – do people understand that this is a required response or one that just keeps happening? Not mere assumption by one party.
PAST PRACTICE

- **Zipper clauses**
  - Do they foreclose everything? May foreclose all *prior* practices – did they re-start?

- **Maintenance of benefits clauses**
  - Do they allow everything? Will not negate a management right

- **Practice subject to reasonable regulations**
  - Practice may change as long as essential feature of it is maintained
Can you ever change or get rid of it? – opting out of the past

- Negotiate your way out – be specific though
- Change of circumstances that negates the underlying reason for the practice
- Repudiation during negotiations
  - Where CBA language is clear and unambiguous – may require the party seeking to KEEP the practice to negotiate changed language. Eden Prairie
  - Where language is ambiguous and needs the practice to give it meaning – may require the party seeking to CHANGE the practice to negotiate changed language. Blaine.
PRACTICE TIPS

- If practice has been negated or repudiated – has the ER “restarted it?”

- Cannot repudiate a management right

- Exercise of managerial discretion is not binding past practice
Arbitration is about process – objections interposed to protect the process - process is informal but not a free for all

Some objections are about trying to keep out whole sections of the other side’s case – some designed to keep out pieces of evidence or cast doubt on probative value

Some procedural – others substantive
2 TYPES

- **Procedural** – timeliness – the issue is about the processing of the grievance and whether the case can be considered at all.

- **Substantive** – whether the arbitrator has the power to decide the matter.
  - Can be decided by arbitrator or Court even after the hearing.
  - May be tied to managerial rights.
TIMELINESS/PROCEDURAL ARBITRABILITY

- Time deadlines are just that – miss them and you’re dead –
  - Considered jurisdictional – CBA is where arbitrator’s power comes from & prescribes the agreed upon way to process grievances

- Have timelines been strictly enforced?
  - If not, arbitrator may allow case to go forward – based on past practice or lax enforcement theory
  - If have – case may be dismissed even if no prejudice and mistake is “innocent”
Policy in favor of hearings on the merits

- Some arbitrators rely on “public policy” theory to allow a grievance to go forward.
- Is there ambiguity? If so, arbitrators may lean in favor of deciding the case on the merits to foster stability and resolution of issues on the merits rather than on technicalities.
- Was there substantial compliance with the process, albeit not perfect? Close enough theory
  - May give grounds to allow the case to go forward.
When does the time start?

- Informal process – after EE and supervisor have a chance to discuss it?
  - When is EE to bring the issue up?
  - When/how are they to “discuss” the issue?
  - How long does the supervisor have to get back to the U or the EE?
  - What form does the response have to take?
  - Spell this out if have an informal process otherwise there will be a latent ambiguity that will give arb way to hear the case
When does the time start?

- Time runs from the date of discovery of the infraction “through use of reasonable diligence”
  - What does that mean?
  - How hard was it to discover the violation?
  - Did ER try to hide it?
  - Was the U or EE asleep at the switch? Or just didn’t think of it?
  - If EE had knowledge the U may be stuck with imputed knowledge
When does time end?

- What if the prescribed time ends on a Sunday, Saturday or legal holiday
  - Many CBA’s have strict time frame for appealing to the next step
- Does the CBA prescribe what happens or is it silent and just say ‘X’ days from the last response?
What if failure is due to human error?

- May not save the Union if the times have been strictly enforced – if lax enforcement though may be different

- If there was an effort to extend limits and there was a misunderstanding though, that may be enough to allow the case to go forward. Depends on the facts.
  - The suspension and the discharge case – U thought times had been extended for both; ER though it was just for the one
What does the grievance have to look like and where does it have to be filed?

- Is there a prescribed form or format the grievance has to be on?
- Is there a prescribed office or person to whom the grievance must be sent or addressed?
- What if the CBA says only that the grievance must be “registered” in writing?
- Informal grievance steps – oral statement to supervisor – then what and when?
What are the contractual consequences for missing the time deadline?

- Are there any? Many CBA’s prescribe the time lines but say nothing about what happens if they are missed? Is the Arb. to imply them?

- Does it say grievance “may” or “shall” be waived if they are missed?

- Has the U adhered to ALL of the steps – Bozeman case where appeal to arb. Was done but the last step to BOPA was not – and said waived
PROSPECTIVE EVENTS

- Time starts when the actual event occurs
- Example – ER says it will change shifts etc. on a particular date, 4-1, but does not take effect until 6-1.
- Does the time start on 4-1 or 6-1?
- Most arbs. Say 6-1 because the event has not occurred, i.e. the event giving rise to the grievance – parties could still negotiate/discuss the proposed action without resort to hardening of positions in grievance process
Waiver of timeliness defense

- Some arbs say that must raise the defense prior to hearing or it’s waived.
- Not clear how *much* in advance of the hearing it must be raised.
- O/ arb’s don’t adhere to this and allow defense to be raised right up to or even at the hearing.
- There is no clear rule.
- PRACTICE TIP: raise it as soon as you see it and be specific about it. E.g. don’t just say “untimely” as a general proposition.
ER IS LATE RESPONDING

- Depends on the CBA language
- Does it say, moved to the next step
  - ER may have a tougher time asserting a timeliness defense if ER is late responding
- Does it say that the grievance is admitted – rare case but they are out there.
  - If Mgt. fails grievance upheld – West VA. And Laborers 133 LA 170
EQUITABLE ESTOPPEL

- Prevents a 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
- We’ll pay and the after time runs, say we won’t
- Central Hardware – Promise to pay led U to not file, later said wouldn’t pay – no $
- Fresh Seasons case – recall that
Grievant doesn’t understand the “event”

- Many CBA’s call for time to commence from the “time of the event giving rise to the grievance” or when the EE knows of the event.
- If difficult to understand, i.e. a paycheck, or the ER has tried to hide the event, OK, but what if the EE lacks the mental capacity to understand? Very fact dependent and an uphill climb for a U – U owns grievance; did the rep. understand?
- Brainerd case – EE got FHA’d and claimed not understand but stopped coming to work and disappeared. U not get in touch.
CONTINUING GRIEVANCES

- Time honored exception to timeliness defense is that each time ER persists in violating CBA, there is a “new” violation.
  - NB – did not apply in the prior case – U argue that each day the ER not let EE return to work it is a new event – No sale
- Act must be repeated from day to day
- Can these be limited to X time from the “first” such event? Depends on CBA language
CONTINUING GRIEVANCES

- Be careful though – if the “violation” persists it could give rise to the defense that the U and EE’s acquiesced or even that there is a past practice.

- Also, any remedy will generally be limited to the time of the filing or at least the prescribed time just prior to the actual filing of the grievance.
LAST CHANCE AGREEMENTS

- This is not a general discussion about LCA’s, what they should have in them or how valid they are.
- Most limit Arb’s jurisdiction to whether there is a violation – factual determination.
- Once that is made – the consequences are set – usually FHA – No power to impose lesser penalty.
MGT. RIGHTS – very fact dependent

Examples – is it about use of technology, production, staffing needs etc. NOT covered anywhere in the CBA

Is it covered somewhere in the CBA – Mgt. Rights are always subject to the specific terms of the CBA
Adding a new claim

- What is the grievance about?
- Has the entire theory been altered at the last minute?
- Or is it a modest amendment to it?
- Question of notice and opportunity to be prepared
- BUT – if add a truly new grievance, is it timely? May not be able to tie onto the original time line
ADDING A NEW CLAIM

- Case #1 – original claim for cost of training; amended right before hearing to include wages paid during training – DENIED
- Case #2 – new theory for the case – Gr O/ lay off of some EE’s that did not have certification to perform work. Alleged violation of SRTY clause. Later amended to include a claim for the training to get the certification. DENIED.
- Fact specific and may depend on when the amendment was made
Does arb. have the power to grant the remedy requested

- Policy is silly - OK, but is it within Mgt’s power to promulgate? If so, no power – Mgt. right.
- Put the EE back to work or modify her job – again, arb. Likely not have power to force ER to create a job or to change the job description
- Enforce statutory rights on theory that ER must act lawfully – generally that’s for the Courts unless it is VERY clear that the CBA was intended to include that dispute, i.e. over ADA, FMLA or other statute in the CBA – Penn Plaza
Matters specifically excluded from grievance procedure

- This should be easy but there are sometimes very clever attempts to circumvent it.
- What does the CBA say – really? Is it excluded or not?
- #1 – merit pay for faculty was excluded but Union argued that the process was flawed and needed to be re-done.
CONTRACTUALLY MANDATED EXCLUSIONS

- Contract cuts off “old” discipline and one side tries to introduce it
- What does the CBA actually say?
  - What is the time exclusion and when does that start – from time imposed or final?
  - Excluded for *any and all* purposes?
  - For “progressive discipline” or o/ ltd purpose
  - Does it require any other action to be removed?
OBJECTIONS TO ARBITRABILITY

- Bifurcation of the hearing to determine arbitrability
- Pros and cons – no clear answer here
  - Pros: if not timely may not need to deal with merits at all
  - Cons: if it is timely there will be delay
- If substantive, probably makes sense to hear the case in its entirety
Some lessons

- Pre-hearing issues – subpoenas
  - Hold a pre-hearing conference call if there are objections
  - Sequestration of witnesses

- Motions. Decide how much evidence you need for this if there is a motion to dismiss or to limit the scope of the hearing. They are rare, but do occur.

- Need a live hearing? Maybe not if facts are stipulated.
Hearings in a virtual world

- Arguments in favor of live hearings
  - Assessing testimony body language
  - Exchange of exhibits
  - Security issues with virtual hearings
  - No technical glitches (Cf. Met Council case)

- Arguments in favor of virtual hearings
  - Assessing testimony
  - Safer & Less costly
  - Exhibits by sharing screen
  - Break out rooms
  - Travel delays
Who decides what type of hearing if it’s disputed

- See NAA opinion #26 – the arbitrator makes the call but only after consultation with parties and assessing the factors in each case.
- Hold a pre-hearing conference to hear each party out.
Some how to’s of virtual hearings

- Decide which platform to use, Zoom, WebEx etc.
- Arbitrator should be the host – even if a court reporter. You can control the meeting, breakouts and screen share
- Exhibits in advance.
- Test speakers and video
- Provide for call in by phone
TIPS FOR ARBITRATORS

■ Disclose! See MCA 27-5-116, (7) excludes arbitration pursuant to a CBA

■ Prior employment

■ Any relationship personal or professional with the advocates or any party

■ Ongoing disclosure
  ■ E.g. You discover you know a witness or a relationship you did not know of

■ Maintain a “professional distance”
  ■ Be cautious going to parties or golf outings etc.
Excess of powers

- VERY fact specific

- Did the award draw its essence from the CBA?
  - Can be an issue in past practice cases and issue of remedy
  - *How* did the award draw its essence from the CBA?
  - Is there any precedent for an award of “punitive damages” – or better yet, are they really compensatory?
Emotional witnesses

- Play this by ear
- Let the witness/advocate decide if the witness can keep going or needs a break
- If advocate is badgering the witness and here is an objection, suggest that things calm down. If no objection you can ask if the witness needs a break. Be careful with this though
Dealing with objections

- Don’t rule too quickly generally
- Ask for input from both sides as to the basis of the objection and any arguments about it.
- In camera review of documents or other evidence, i.e. sensitive videos or pictures
- Rule and move on!
Dealing with the objectionable

- Some advocates like to try to bully everyone, including you
- Do NOT let this happen. You are in charge of the hearing
- If things get hot, take a break and if practical, get the advocates away from their clients and let them know that antics do not help their case.
- Stay calm and arbitrate on.
TIPS FOR ARBITRATORS – DRAFTING THE DECISION

- Make sure you state the issues and that your decision “draws its essence from the labor agreement”; whatever that is (?)
- I always err on the side of admitting documents and evidence, 27-5-312 (d). Use only the proven evidence; don’t guess at anything.
- Set forth the provisions of the grievance procedure in the award – for jurisdiction
- Take the adjectives out
Appeals of arbitral awards

Can they be? Yes, see MCA 27-5-312

- (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.
Post hearing requests

- Requests for clarification or correction of typos or simply mathematical errors.
- MT code 27-5-313 and 27-05-217 allows for this.
- Requests for “reconsideration.” This may not be allowed as it is nothing more than a request to change a decision one side didn’t like.
WHAT IS YOUR LEGITIMATE ROLE?

- Never decide the case until you’ve heard it – you never know, the evidence might make some difference to you. Indeed it will.
- You’re an umpire – you call balls and strikes – out or safe. You are not a mediator.
- Do NOT tell the batter how to bat, the pitcher how to pitch or the manager how to manage.
- Never keep score; each case is unique and the side with better facts and argument wins. Period
THINGS ARBITRATORS SHOULD REMEMBER

- Be cordial & respectful. You can be friendly but you’re not their friend.
- You may spend a lot of time in airports, hotels and restaurants by yourself. Get used to it. But see discussion above about virtual hearings.
- You are the most ignorant person there and the person the parties dislike the least – get used to that too.
BEST & WORST PRACTICES

- **Punctuality**
  - **DO** be on time, for the hearing and breaks
  - **DO** – issue awards in a timely fashion
  - **DON’T** – fail to show up
  - **DON’T** – Request to push back hearing time
  - **DON’T** – show up unready to start
  - Don’t - ask for repeated extensions for awards
HEARING MANAGEMENT

- Be organized – have everything ready
- Cover ground rules
- Get issue statements so you’re clear
- Mark exhibits beforehand – even ask to get them a day early
- Promptly decide objections and MOVE ON
- Keep hearing on track
- Promptly address incivility and indicate it is not tolerated nor will it help their case
HEARING MANAGEMENT

- Don’t allow hearing to go off track
- Don’t allow witnesses to ramble
- Don’t fail to promptly rule on objections
- Don’t allow endless back and forth on objections and arguments
- Don’t permit incivility
BE ENGAGED

- Listen actively – eye contact with witnesses and advocates
- Take notes or use a recording device
- Follow along with documents
- Ask only clarifying questions
BE ENGAGED

- Don’t announce upon arrival that you need to leave early
- Don’t cut witnesses off
- Don’t discuss settlement
- Don’t tinker with your phone or computer during the hearing
- Don’t drift off because there is a reporter or recording
- Don’t read other things or fall asleep
PROFESSIONAL DEMEANOR

- Be calm and professional
- Be courteous and cordial
- Be decisive but not overbearing
PROFESSIONAL DEMEANOR

- Don’t arrive angry because of some delay
- Don’t be arrogant or impatient
- Don’t be sarcastic or rude
- Don’t interrupt or give aid to an advocate who may be struggling
- Don’t talk politics or “trash” anyone
- BE CAREFUL what you say especially on Facebook and social media
- Don’t touch people
NEUTRALITY

- Make sure both sides get a full and fair opportunity to present their case – don’t cut people off
- Don’t fraternize with one side - rides to the airport, lunch, I don’t even go in the elevators with one side.
- Don’t allow evidence to come in after the hearing closes
NEUTRALITY

- Don’t “cross examine” witnesses – you can ask clarifying questions but wait until both sides are done with their questions.
- Do not tell a grievant that they’ll be going back to work – or that the grievant won’t be – that’s for your decision not chit chat in the hallway.
- Don’t discuss other cases or their merits.
NEUTRALITY

- Don’t ask for special treatment
  - Rides
  - Personal copies of things
  - Ask advocates for pens, paper or supplies
  - Have the advocates get you a snack or a cup of coffee
DECISION

- Decide the issue(s) and only the issue(s)
- Let the advocates know you “heard them”
- Decision is based on the evidence
- The decision is clear and concise
- Take the adjectives out where possible
- Spellcheck and proofread it
- Don’t disparage the losing side for fallacy of their argument
DECISION

- Don’t fail to resolve the dispute
- Don’t lecture people
- Don’t issue a “bullet point” decisions – explain the decision
- Don’t add to or amend the CBA
- If you “split the baby” explain why
- DO NOT start keeping score – each case rises/falls on its own unique facts