EXTERNAL LAW AND THE IMPACT ON ARBITRATION

JEFFREY W. JACOBS

ARBITRATOR – MEMBER OF THE NATIONAL ACADEMY OF ARBITRATORS

7300 Metro Blvd. #300
Edina, MN 55439
612 760 6328
jjacobs@wilkersonhegna.com
www.jeffreyjacobsarbitrator.com

I. INTRODUCTION AND SCOPE OF THE TOPIC

Elkouri in *How Arbitration Works*, 8th Ed, BNA Books 2016, devotes an entire chapter to the concept of the use of substantive rules of law and how those impact labor arbitration cases. Arbitrators should strive to never make a ruling either in a discipline or contract interpretation case that is contrary to existing state or federal law. That is why most labor agreements, and contracts in general have a severability clause that states that if any portion of the agreement is found to be contrary to existing law, that voids only that portion of the agreement and not the entire contract.

The other question though is how existing law might affect the outcome of a labor arbitration case and to what extent parties can cite to or rely on external law to support their case, whether that be from management or the Union side of things.

This topic will discuss some issues that can arise in matters such as workers compensation claim and how that might impact a case, FLSA issues (although they will be rare indeed), FMLA matters and how they might impact disciplinary cases, especially those involving absenteeism and failure to maintain regular attendance, external laws regarding certain type of family or sick leave, marijuana laws and how federal pre-emption issues might impact a case and how external criminal matters can impact the outcome of a disciplinary matter. Finally, what is the impact of the inclusion of certain anti-discrimination or external statutory schemes by reference in a labor agreement.

II. GENERAL DISCUSSION AND THE VIEWS OF ARBITRATORS

Elkouri discusses the notion of how external law may impact the outcome of the contractual dispute at some length as follows:

> "[p]rivate sector parties are free to control the degree to which the arbitrator is to consider external, including statute and regulations, in deciding the case. To be sure, the field of labor relations has although developed through collective bargaining and arbitration, has never been purely private. Various state and federal legislation has always existed, providing various degrees of detailed regulations of working conditions in various industries. …
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> Long ago, the US Supreme Court emphasized that arbitration awards are generally not subject to being set aside for errors of law. See, *San Francisco Unified School District*, 114 LA 140 (Riker 2000). See *How Arbitration Works*, 8th Ed. footnote 1 on page 10-2 for other citations). … The continued vitality of the general rule that awards are not impeachable for errors of law has been recognized by federal and state courts in both statutory and common law arbitration. (Some citations omitted. But see *Postal Workers v U.S. Postal Service* 789 F.2d 1 (DC Circuit 1986) where the Court held that awards may not generally be overturned for a mistake or an error of law.).
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> In *Steelworkers v Enterprise Wheel and Car* 363 U.S. 593 (1960) the Supreme Court appeared to substantially limit the degree to which courts could second-guess arbitration decisions. Unless the award was the product of fraud, or somehow exceeded the arbitrator's authority, or unless it failed to draw its essence from the labor contract, the Supreme Court told courts to refrain from reviewing the merits.

However, while an error of law is unlikely to get an award overturned, the essential question is how much impact external law has, or rather, should it have, on the outcome of an arbitration in the first place. In discussing the views of arbitrators Elkouri notes as follows:[1]

> "An interpretation giving a contractual term a law lawful is preferable to one that makes an agreement unlawful. In the absence of clear direction from the contract or the parties, arbitrators are otherwise divided on whether they should consider external law in applying a collective bargaining agreement. Citing *The Common Law of the Workplace*, Snow, *Contract Interpretation,* St. Antoine Ed. BNA books 2005, section 2:15, see discussion below.

Elkouri continues as follows:

> In accord with that statement, arbitrators generally accept the following three propositions. First, an arbitrator may consider all relevant factors including relevant law, where the contractual provision at issue has been formulated loosely. Second, where a contractual provision is susceptible of two interpretations, the one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant consideration in interpreting the language, and arbitrators should seek to avoid an interpretation that would make the agreement invalid. Finally, where the submission makes it clear that the parties want an advisory opinion as to the law, such an opinion would be within the arbitrator's role. Elkouri 8th Ed. at page 10-13. Citing Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 20th Annual Proceedings of the NAA 1967.

In this regard, Elkouri continues:

> "One commentator urged that where there is clear conflict between the agreement and law, the arbitrators should 'respect the agreement and ignore the law.' [P]arties call on an arbitrator to interpret their agreement, rather than to destroy it, and there is no reason to credit arbitrators with special expertise to discern the law, as distinguished from the meaning of an agreement. Thus, arbitrators should 'respect the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravene a higher law.'" Elkouri 8th Ed at page 10-14. Citing *Meltzer*, supra at 16-17. See also, *Hunter Engineering*, 82 LA 482 (Alleyne 1984) and *Olin Corp*. 103 LA 481 (Helburn 1994) where the arbitrator ruled that a company was not required to accommodate a disabled employee in a way that violated contractual seniority rights. Id. At page 10-14.

Elkouri though, notes that:

> "In sharp contrast to this position, one arbitrator insisted that 'arbitrators, as well as judges, are subject to and are bound by law, whether it is the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statute and common law; and each contract includes all applicable law. … There is a responsibility of arbitrators, corollary to that of the General Counsel and the NLRB to decide, where relevant, a statutory issue. That the NLRB, consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issue through arbitration may be fulfilled." Elkouri 8th Ed. at pages 10-16 and 10-17, citing Howlett, NAA 20th Annual proceedings (1967).

[1] See discussion below regarding situations where a statute is specifically referenced or incorporated in the CBA itself. Under those circumstances the arbitrator may be bound by the statutory language since it was made part of the CBA itself.

Obviously, this is a very different view of the applicability of external law to the view previously espoused. The former view is that external law is a factor to be considered in interpreting the labor agreement, but that the agreement essentially controls the result, while the latter is that the law is not just a factor to be considered in interpreting the agreement, but instead that it should effectively control the result. Not all arbitrators agree with that either.

Other arbitrators take a somewhat intermediate position and advance the theory that an award may "*permit* conduct forbidden by law, but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract." Elkouri 8th Ed at 10-16. Citing Mittenthal, *The Role of Law in Arbitration*, 21st Annual Meeting of the NAA (1968. (Emphasis in original quotation.)

Other propositions regarding the use of external law become less clear, but what is clear is that there is no generally accepted agreement among arbitrators as to how and to what extent external law should be used. As always, it may well depend on the facts and contract language at issue.

Other arbitrators have espoused differing views depending on the facts of an individual case to try to identify the circumstances under which an arbitrator should – or should not – consider external law in deciding a contract grievance. In that regard, Elkouri cites Arbitrator Franckiewicz in *Duraloy Company* 100 LA 1166 (Franckiewicz 1993) as follows:

> First, an agreement itself might incorporate various laws, or require or authorize an arbitrator to consider [external law]. Second, the agreement might forbid the arbitrator from giving any consideration to outside laws. Since the role of an arbitrator is to give effect to the agreement, few would dispute that the arbitrator should consider external law in the first situation and should not in the second. … A third situation occurs where a reference to external legislation might assist in interpreting specific provisions of an agreement. For example, an agreement might refer to 'overtime,' without defining what is intended by that term. In such a case the arbitrator might refer to the Fair Labor Standards Act. … A fourth situation occurs where the agreement is silent, but the arbitrator is asked to consider some statute, case or regulation and read it to the agreement. For example, a contract might contain no provision relating to health or safety, but the arbitrator might be asked to require the employee to comply with OSHA regulations. The fifth situation, which might be considered the reverse of the fourth, is where the contract imposes an obligation, but one party contends that the contractual obligation would conflict with the law, and that the arbitrator should therefore decline to follow the contract as written. My view is that in the fourth and fifth situations described above, the arbitrator should consider only the agreement and not the external law. Where reference to statutes, regulations or decisions is not necessary in interpreting an agreement, the only effect of considering such external sources of law would be to amend the contract by adding or subtracting. The proper role for an arbitrator in only to interpret a contract, and not to rewrite it." See also *Cosmic Distributing Co*, 92 LA 205 (Prayzich 1989), *Geo. Hormel & Co*, 90 LA 1246 (Goodman 1988), *FMC Northern Ordinance Div*. 90 LA 834 (Bognanno 1988,) where the arbitrator specifically ruled that he had no jurisdiction to decide an unfair labor practice.); *Indiana Bell Telephone*, 88 LA 401, (Feldman 1986) and *Fleming Foods*, 90 LA 1071 for similar rulings.

This is perhaps the most cogent and "best" theory to use and appears to be based on a case-by-case approach rather than one that adheres strictly to one viewpoint, one of which appears to hold fast to the contract language no matter what and the other to apply the law irrespective of what the contract itself might say or the bargaining history between the parties might be.

Elkouri also observed that "the expressions of many other arbitrators fall somewhere within the spectrum of these arbitral doctrinal views. However, in evaluating the expressions, it should be kept in mind that external may be used for some purposes, but not for others, and any given arbitrator quite properly may feel justified in relying on external law in one situation while declining to do so for some other situation." Elkouri 8th Ed at pages 10-22 and 10-23.

Professor Snow and St. Antoine in *The Common Law of the Workplace,* supra, at Section 2:15, page 84, made similar observations regarding the differences of opinion among well respected arbitrators regarding the use of external law in interpreting labor agreements as follows:

> "A diversity of opinion exists among arbitrators, however regarding the appropriate use of external law (ordinarily a statute or regulation when applying it to unambiguous contractual language. Arbitrators generally agree that they are obligated to interpret an agreement in light of the law when parties have incorporated specific legal references or verbiage into their agreement. Some arbitrators conclude that an agreement should be interpreted in a manner consistent with external law whenever parties have included a severability or savings clause in the agreement indicating a desire to excise unlawful parts of the agreement.
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> Substantial differences can be found among arbitrators regarding the appropriate arbitral role when interpreting a labor contract that does not clearly incorporate some aspect of the law into the agreement. As Arbitrator Mittenthal and Bloch noted 'the prevailing view, particularly in the private sector, is that laws are not part of the contract and that arbitration is not a forum for enforcing statutory rights.' Mittenthal and Bloch, *Arbitral Implications, Hearing the Sounds of Silence: Part 1*, 42 NAA 65, 70 (1990). On the other hand, some arbitrators conclude that it is always appropriate to consider law when interpreting a collective bargaining agreement. Still others sanction an interpretation that includes consideration of external law if it is necessary to do so in order to avoid an award ordering the parties to engage in unlawful conduct."

Elkouri cites numerous arbitral opinions on whether external law should be considered at all versus whether it should be considered as a factor in interpreting the contract. Some arbitrators ignore the law entirely, reasoning that their jurisdiction derives exclusively from the labor agreement and not state or federal law. Others reason that they are subject only to the contractual provisions and unless they are being asked to order someone to do something unlawful, the law is not the sole controlling factor. Others still reason that their role is not to assume jurisdiction over areas that are the responsibility of the Courts or the NLRB, or applicable state agencies for that matter.

It appears that the most well-reasoned approach is something in the middle, whereby external law can be used as a factor to aid in the interpretation of a labor agreement, but that ultimately the arbitrator's role is to interpret labor agreements in light of the facts of the case, the bargaining history and the intent of the parties as expressed in the language they used and the practice they themselves have accepted.

But it should be noted too that most arbitrators will not take issue with the validity or wisdom of the external law or a judicial or administrative decision. While some may rule that a particular judicial decision may not have application to the issue at hand under the CBA, most will not question the validity of the decision itself. As one arbitrator observed, "it would be unseemly for a mere arbitrator to flout the jurisprudence of the United State Court of Appeals because he did not believe that its decisions exercising jurisdiction over him was based on sound legal thinking." *Veteran's Affairs Dept*., 95 LA 253, 257 (Avins 1990).

PRACTICE TIP

As is plain from this discussion there is no general consensus among arbitrators as to how much external law impacts an arbitral decision – or should. Research your panel of arbitrators if you think external law might be argued by one side or the other. Does the arbitrator you picked believe that the law essentially governs no matter what the contract says and will likely interpret the contract only consistently with the external law or regulation? Or, on the other hand, will the arbitrator be more likely to use the language of the contract as the governing factor and use external law only as an aid in interpreting contractual intent? This is why I generally say you should always look beyond the award on the last page to determine an arbitrator's thinking process. How an arbitrator gets to their conclusion can be every bit as important as what the decision is.

TRILOGY CASES, GARDNER DENVER AND PENN PLAZA

Elkouri noted that *Steelworkers v Enterprise Wheel and Car* supports those who conclude that where there is conflict between the agreement and the law, the arbitrator should respect the agreement and ignore the law. The Supreme Court in *Enterprise Wheel and Car* in commenting on the appropriate treatment of an arbitral award stated as follows:

> It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to the law for help in determining the sense of the agreement." *Enterprise Wheel*, at page 597-98.

The Court subsequently dealt specifically with the issue of the arbitrator's role where the labor agreement conflicts with external law in *Alexander v Gardner Denver*, 415 U.S. 36 (1974). The Court held that " the arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties and that arbitration is a relatively inappropriate forum for the final resolution of rights created by Title VII of the Civil rights Act. Further, that the arbitrator's task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement." 413 U.S. 55, 56-57.[2]

The Court however, in *Gardner Denver* dropped a footnote that seemed to allow, even invite, arbitrators to examine external law in interpreting contract language. That footnote read as follows:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitration forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.
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> This is especially true where the issue is solely one of facts, specially addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

[2] It should be noted that the actual holding in *Gardner Denver* was that an employee's statutory rights to trial on a discrimination claim under Title VII was not foreclosed by his claim to arbitration, even though the arbitral award was adverse to the employee. The employee retained a right to a trial *de novo* in Court.

Later however, in *Penn Plaza v Pyett*, 556 U.S. 247, 186 LRRM 2065 (2009) the Court changed course a bit and appeared to reject the *Gardner Denver* suggestion that arbitration is not an appropriate forum for resolution of statutory rights. There though, the parties had incorporated a specific reference to the ADEA into the CBA. The Court held that the parties had agreed thus that ADEA claims would be resolved in arbitration. The Court also noted specifically with regard to ADEA claims that the ADEA does not preclude arbitration of claims arising under that statute. The Court held squarely that a provision in the CBA that clearly required the Union to arbitrate ADEA claims is enforceable as a matter of federal law.

Thus, *Penn Plaza v Pyett,* did not completely settle the difficult question of whether arbitrators must use external law in deciding cases. It is relatively apparent that there is no single theory that prevails and that the arbitral commentators as well as active arbitrators do not agree on whether external law should be used, always, never or on a case-by-case basis.

Practitioners should be aware that the impact of having a specific reference to anti-discrimination laws in the CBA may well give the authority to an arbitrator to decide such issues which is in many cases outside their area of expertise. Whether that would also disallow an aggrieved employee from then taking that same set of facts to court is unlikely, but not impossible.

Elkouri notes that arbitrators may consider only the CBA in a private sector case and give no consideration to external law. There, the question is whether the award draws is essence from the labor agreement and as long as the award does not command the commission of an illegal act it should withstand judicial review.

In summary, Elkouri also notes that arbitrators may choose to consider external law along with the CBA. If the arbitrator merely looks to external law for assistance in interpreting the CBA it too will likely withstand judicial review. Again though, Elkouri notes that the award should not order an illegal act and should not be contrary to an explicit public policy. Further, the mere fact that an arbitrator may have misconstrued the law is not generally regarded as a basis for overturning the award. See, Elkouri 8th Ed at page 10-26.

Likewise, in state public sector cases, Elkouri notes that these too are to be decided on a case-by-case basis. Arbitrators are empowered generally to consider external law, both state and federal, in order to aid in the interpretation of disputed language. Perhaps the best way to delve into this discussion is to cite some examples of how external law has been used in certain circumstances.

TITLE VII CASES

Gardner Denver dealt squarely with a Title VII case. Elkouri 8th Ed at section 10.3.A.i at page 10-30 notes as follows:

> "Arbitrators generally consider Title VII claims in arbitrations where the grievance specifically states a claim under Title VII and the CBA incudes a nondiscrimination clause either incorporated into the statutory prohibitions or referring to the statute.
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> Some arbitrators have demonstrated a willingness to consider Title VII claims even absent a specific nondiscrimination or antiharassment policy in the agreement. …[One arbitrator noted that, given the strong public policy argument alone, widely established by the courts and legislatures a disciplined grievant was placed on notice of the legal prohibition against sexual harassment. Whether the grievant was actually aware of the prohibition is not important. He *should have known*, given the widespread effect of the strong public policy against sexual harassment. (Citing *Conagra Frozen Foods*, 113 LA 129, 133 (Baroni 1999)). (Emphasis in original decision).

Consider however, *Oklahoma City*, *Oklahoma*, 121 LA 1048 (Scheiber 2005), where the arbitrator found that the grievant had engaged in sexual harassment, but reduced the termination to a suspension. The arbitrator ruled that "while it is certainly true that there is a public policy against sexual harassment … There is no public policy that every harasser must be fired." It was a case where the facts were considered against the statutory public policy, but the notion of just cause prevailed to allow the arbitrator to reduce the penalty based on the facts presented.

Thus, while no hard and fast rule can be gleaned from these cases, it is relatively clear that the facts of each case are to be considered along with the consideration of the statutory pronouncements.

FLSA CASES

Elkouri notes, not surprisingly, that arbitrators disagree over whether the provisions of the labor agreement or the FLSA should control where there is an apparent conflict between them. See, Elkouri 8th Ed at section 10.3.A.ii.

In *Barrentine v Arkansas Best Freight System*, 450 U.S. 728 (1981) the Supreme Court held that an arbitrator's decision on an employee's minimum wage claim did not preclude that employee from bringing a claim in Court. This case stands for the proposition that an arbitrator's award is not binding on a Court, but what about whether the FLSA statute is binding on an arbitrator?

Arbitrators can look to the FLSA for assistance in determining the definition of "overtime." Parties are always free to negotiate a provision calling for overtime that is in excess of the FLSA's requirements. For example, they could negotiate for overtime at more than time and a half. Or they could negotiate a provisions for overtime for more than 8 hours per day irrespective of whether the employees works more than 40 hours per week. The parties could also negotiate for overtime even though the employee does not physically work on some days in a week, but instead receives vacation or sick leave pay or type of other pay for those hours.

In *Iowa Correctional Institute*, 132 LA 1748 (Szuter 2014) the arbitrator ruled that the question of overtime is one involving the FLSA, but also "no less a matter of contract where contract overtime is the issue." There the arbitrator used FLSA regulations to assist in determining the question under the labor agreement. It is clear that an arbitrator can use the FLSA or its regulations to assist in determining an issue that arises under the contract.

Some arbitrators hold that the CBA must conform to statute, see *Pennsylvania Electric Company*, 47 LA 527 (Stein 1966). Others hold that even if the contract language appears to conflict with the FLSA, the contract controls. See *Hilo Transportation and Terminal* 33 LA 541 (Burr 1959) and *Hubbard and Johnson Lumber*, 70 LA 526 (Feller 1978).

Practitioners should research their arbitrator a bit to see if their prior decisions provide any light on how that arbitrator might rule where the FLSA may be involved in any given set of facts.

ADA CLAIMS AND THE CONTRACT

This is the issue of whether and to what extent the ADA compels a result in claims of discrimination by employees alleging certain disabilities. Elkouri notes that nothing "compels an employee to submit a discrimination claim cognizable under the ADA to an arbitrator … However, many arbitrators have held that once a claim is submitted to an arbitrator, the provisions of the ADA – as judicially interpreted – may be looked to for guidance and applied by the arbitrator to the extent relevant" Elkouri 8th Ed, at page 10-34.

Elkouri also notes that the ADA contains a provisions protecting seniority provisions, See e.g., *Olin Corp*. 103 LA 481 (Helburn 1994) where the arbitrator ruled that a company was not required to accommodate a disabled employee in a way that violated contractual seniority rights. See also, *US Airways v Barnett*, 535 U.S. 391 (2002), where the Court held that the disabled employee bears the burden of proving special circumstances that make creating an exception to the seniority rules reasonable.

Other cases require that job modification and job transfers "invariably require application of the ADA's reasonable accommodation ADA analysis." See e.g., *San Francisco Unified Sch. District*, 114 LA 140 (Riker 2000) and *Los Angeles Community College*, 112 LA 733 (Kaufman 1999).

Elkouri further notes that "arbitrators often look to the jurisprudence of the ADA for guidance in addressing questions of whether an employee is disabled and, if so, whether the employer reasonably accommodated the employee's disability." Id at page 10-35. See e.g., *City of Norman OK*, 122 LA 929 (Goldstein 2006) where the arbitrator ruled that because the employee had not followed the medical treatment necessary to relieve her disability, the employee did not qualify as disabled under the ADA and that the employee was not disabled for purposes of the labor contract.

It should be clear too that a CBA can place greater restrictions and requirements on an employer to accommodate a disability than is found in the ADA. A CBA could, for example, place a broader obligation on the employer to employees injured on the job than those in the ADA in order to protect employees from removal where their disability prevents them from doing their regular job. See Elkouri 8th Ed. generally at section 10.3.a.ii. See also discussion below on the effect of workers compensation laws on the interpretation of contract language.

Most arbitrators will take statutes, including the ADA, into account in making decisions, especially in the instance of the ADA, which specifically encourages arbitration. See Elkouri 8th Ed at page 10-36.

FMLA ISSUES

Elkouri notes that "arbitrators also look to the statute for guidance in attendance cases, even if not citing specific provisions of the FMLA." Elkouri 8th Ed. at 10-37. The question here is whether arbitrators follow the regulations under the FMLA in determining such issues as whether the employee has a "serious medical condition" or whether the employer can require the employee to use accrued vacation time for an FMLA leave.

The other issue that arises frequently, especially in the context of absenteeism cases, where one of the defenses is that the absences were protected by FMLA and thus should not count toward the employee's record. This is true certainly in cases where the employer has a "point" system or a so-called "no-fault" absenteeism policy. Under those policies the reason for the absences may not be that important; what is important is the absence itself. Employees under these types of systems are allowed a certain number of absences, but each counts as a certain number of "points" and when they reach a certain level, discipline ensues.

One of the frequent issues that arises involves employees with poor attendance for health-related reasons. They may well have FMLA in the first year this happens, but then are unable to work the requisite 1250 hours per year and in the second year, they no longer have FMLA protection. Without that protection in many cases the discipline is upheld based on a finding that the absence was no longer covered by FMLA. In *USPS and NALC*, (unpublished decision) (Jacobs 2020) the removal was upheld where the employee had not worked the requisite number of hours on the required period under FMLA to continue to be covered. Likewise in *USPS AND APWU*, C10C-1C-D 15270983 (Miles 2016) the arbitrator upheld a removal for failure to maintain regular attendance.

There, the employee claimed that medical issues kept her from work, but the arbitrator rejected those claims and upheld the removal. See, also, *USPS AND NALC*, G16N-4-D 18365480 (Miles 2019), where the arbitrator also upheld a removal even though the employee claimed that serious medical conditions prevented them from getting to work. See also, *USPS and NPMHU*, (unpublished decision) (Jacobs 2017) where the employee's termination was upheld where the employee failed to be regular in attendance and the absences were found not to be covered by FMLA.

It is clear that many arbitrators will use FMLA regulations to determine if an absence is covered or not by the statute, and therefore perhaps should not be counted toward attendance "points" or other requirement to be regular in attendance. These cases will always be very fact specific however.

These cases are, of course, very fact specific, but the clear import of these decisions, and others cited in Elkouri in the discussion of FMLA issues found at Section 10.3.A.iv, show that arbitrators frequently consult the FMLA rules and regulations for guidance as to these issues.

The other question that arises frequently is the adequacy of the medical certification from a health care provider and whether that entitles the employee to leave under the FMLA. In *GE Railcar*, 112 LA 632 (O'Grady 1999) the arbitrator rejected the employee's claim of having a serious medical condition based on the documentation provided which stated that the employee was able to return to work and that the doctor did not disable the employee based on high blood pressure.

On the other hand, in *Internal Revenue Service*, 116 LA 993 (Abrams 2002) the arbitrator overturned a termination where the agency insisted the medical certification come from a "medical doctor." FMLA regulations define a "health care provider," for FMLA purposes to include a clinical social worker. The arbitrator cited the FMLA to provide two options to the employer: 1). Have the employer's health care provider contact the employee's health care provider to get clarification as necessary or 2). Get its own health care provider to issue a second opinion as to the seriousness of the employee's condition.

Cases involving the forced use of accrued leave time have gone both ways as well. In *Smith & Loveless Company*, 119 LA 1444 (O'Grady 2004), the arbitrator found that the labor contract had no restriction on the employer's right to substitute paid leave time for otherwise unpaid leave whenever an employee takes FMLA time. In so doing the arbitrator cited language directly from the FMLA regulations as follows:

> Paid vacation or personal leave, including leave earned or accrued under plans allowing 'paid time off,' may be substituted at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

In *Metro Bus and ATU 638*, MN BMS 22-PA-1351 (Jacobs 2022) the issue was whether the employer could force an employee to use paid vacation leave time where the employee refused to take a forced overtime shift instead of taking unpaid FMLA time. The Union argued that the outcome should have been a disciplinary action instead of forcing the employee to use her paid vacation time.

The Employer argued that while the shift in question was not a "regularly scheduled shift" it was a shift for which the employee was responsible and that her absence was due to an FMLA approved leave to care for her ailing father.

Under those circumstances the grievance was denied and the employer was allowed to use the employee's paid vacation time to cover that shift. The employee was thus paid her full 40-hour week and did not "lose" pay as the result of the refusal – she was also not disciplined for it either. See *Metro Bus,* supra.

THE NLRA AND SIMILAR STATE COLLECTIVE BARGAINING LAWS

It is clear that where a dispute involves both statutory construction and the possible application of the NLRA, dual jurisdiction exists. Elkouri notes though that "arbitrators themselves have long considered that they are not prevented from acting on contract issues merely because the dispute may also involve statutory issues that can be taken to the NLRB. Similarly, the fact that the NLRB had dismissed unfair labor practice charges has not deterred arbitrators from subsequently taking jurisdiction over contact issues involved in the dispute." Elkouri 8th Ed at 10-40, 41.

It is also clear that while an arbitrator is authorized and empowered to consider various sources in such a case, including the NLRA and attendant court or Board pronouncements, the arbitrator's jurisdiction is derived from the contract and the arbitrator has no inherent authority to decide NLRA issues. See *Alexander v Gardner Denver*, 415 U.S. 36, 53-54 (1974).

Elkouri notes that "in many cases arbitrators have considered NLRA issues often with an express finding that there has or has not been conduct of a type that would violate the NLRA, or they have at least considered the NLRA and NLRB doctrine in deciding contract issues." Id at 10-42. See also, *Star and Tribune,* 93 LA 14 (Bognanno 1989); *Ryan Walsh Stevedoring Company,* 89 LA 831 (Baroni 1987), *Twin Coast Newspapers*, 89 LA 799 (Brisco 1987).

It is apparent that whether something is or is not an unfair labor practice might not govern the result under the contract. The arbitrator's jurisdiction derives from that labor agreement and even in cases involving Board deferral, the question ultimately is whether it is a violation of the agreement. See, *Collyer Insulated Wire*, 192 NLRB 837 (1971).

In a recent case, the parties' labor agreement expired and the employer ceased dues deduction after the expiration date. The employer relied on *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019) and argued that the Board reversed prior decisions and ruled that the employer has no obligation under the Act to continue to deduct and remit Union dues after contract expiration.

The Union however successfully argued that the negotiated contract required that dues checkoff was tied directly to the authorizations for dues checkoff signed by the bargaining unit members and that the dues deduction must continue even after contract expiration unless the employee revoked their authorization.

The relevant contract language provided as follows:

> **Dues/Fees Deductions:** The Hospital agrees to deduct Union dues, or comparable enrollment and service fees for employees electing not to become Union members, from the wages of employees who voluntarily provide the Hospital with a written authorization to make such deductions. The written authorization shall be irrevocable for a period of more than one (1) year, or beyond the termination date of this Agreement, whichever occurs sooner. Deductions shall be made from the wages of employees in the first (1st) pay period of the month in which the payment is due. Withheld amounts will be forwarded to the Union by the tenth (10th) of the month following the actual withholding, together with a record of the amount and those for whom deductions have been made.

No employees revoked their authorizations in the interim time between expiration and the execution of a successor agreement. It was also fairly clear that the employer used this as a ploy to put pressure on the Union during contract negotiations and while there is nothing inherently wrong with that, the CBA required that dues deduction continue unless the employee revoked his or her authorization as required by the authorizations themselves.

While the NLRA allowed the cessation of dues deduction, the contract did not and the Union prevailed. See, *SEIU and Allina*, FMCS # 210511-06589, (Jacobs 2022). Thus, while it would not have been an unfair labor practice under the NLRA to cease dues deduction after expiration, the contract still required it. The employer was ordered to pay to the Union directly the dues that should have been withheld from bargaining unit members, but were not in the interim period between expiration and execution of the successor agreement.

There are cases where the arbitrator refuses to consider NLRA issues or that while they can give Board decisions "considerable weight" they did not have to follow Board rulings "blindly." See *Steelworkers v Enterprise Wheel and Car*, 363 U.S. 593 (1960). See also Elkouri at page 10-45 and cases cited in footnotes 194.

As noted above in the *SEIU and Allina* decision, infra, arbitrators generally do not have the authority to decide unfair labor practice claims, since their jurisdiction and power derives from the contract. This appears to be the case even in deferral cases, although arbitrators can certainly consider Board precedent and rulings in deciding the issue of whether there was a contract violation.

Obviously, where the Board refers a case that entails both contract violations and claims of unfair labor practices, the eventual decision by an arbitrator may make it unnecessary for the Board to decide the unfair labor practice charge. In such cases too it is apparent that the Board is not necessarily abdicating its role nor conferring statutory jurisdiction to an arbitrator, but is merely requiring that the parties exhaust all available grievance procedures prior to pursing an unfair labor practice charge.

Still though, arbitrators do consult Board authority in deferral cases and can legitimately use Board rulings in determining whether a contract violation has also been committed as the result of the same set of facts. In many Union security clauses, there are references to the duty to negotiate changes to the contract or an outright prohibition on unilateral changes to the contract without negotiation. In such a case, the arbitrator is empowered to review both statutory and agency and even court rulings in determining if the facts of a given case is a violation of the contract.

In a case arising under a state collective bargaining law that was similar in language to the NLRA the issue was whether the Employer violated the CBA, when it unilaterally made temporary schedule changes to MAPE employees' work schedules. See *State of MN, State Colleges and Universities, and MN Association of Professional Employees*, 2020 BL 379763 (Jacobs 2020). The Union argued that the employer had violated the CBA when it forced employees to flex their hours to avoid paying overtime. The Union alleged that this was a violation of both the FLSA as well as a unilateral change in the CBA and that the unilateral nature of the change was an unfair labor practice.

The State argued that this was a temporary change in schedule, allowed by the management rights clause, and that it had a managerial right to requires employees to flex their hours.

The grievance was denied largely based on the relevant contract language, but there were citations by both parties to the FLSA and whether that statute impacted the decision to require flexing of time to avoid overtime payments. There was also no evidence that allowing the temporary change in schedule would violate the FLSA in any way. Neither was there a sufficient showing that the change was required to be negotiated given the contract language at play and management's general right to control schedules.

That is one example of a case that involved charges of unilateral change in contract language as well as citations to external law. Ultimately, the question was whether there was a violation of the agreement and the decision was aided by reference to external law, but not controlled by it.

In summary, arbitrators certainly do refer to Board and court rulings regarding the NLRA in deciding contract cases, especially those involving both unfair labor practice charges and a claim of a contract violation. The decision will also probably survive any subsequent challenge as long as the award is not repugnant to the Act. See, *Olin Corp*., 268 NLRB 573, 115 LRRM 1056 (1984).

THE NLRA AND SOCIAL MEDIA

Social media has become a ubiquitous method of communication in society. This discussion is not intended to encompass the entire range of issues that can arise, but it is important to note that use of social media that results in discipline is a clear cut instance where external law outside of the four corners of the labor agreement is frequently used by arbitrators.

These are just a few examples of issues that can arise:

Does the employer's policy regarding the use of social media to discuss work related issues violate Section 7 of the NLRA – or similar state statutes that are based on that section of the NLRA?

ANSWER: It can if it chills concerted activity and threatens the use of social media for mutual aid and protection within the meaning of the NLRA. See General Counsel memos: Memo OM 11-74, August 18, 2011; Memo OM 12-31; January 24, 2012, and Memo 12-59 (May 30, 2012).

Polices against discussing one's own wages or other terms of employment may well run afoul of the NLRA's concerted activity section or a related State statute that is based on the NLRA. Discipline issued against employees may well also be affected once an arbitrator consults these documents and holdings and find that just cause does not exists of the rule violates public policy or statute.

Are there cases where discipline has been issued and then either overturned or upheld due to a post on social media?

ANSWER: Yes. Here are a few examples:

Pier Sixty, 362 NLRB No 52 (2015); *Knauz Motors, Inc*. 358 NLRB No. 164 (Sept. 28, 2012); *Hispanics United of Buffalo*, 359 NLRB No. 37 (December 12, 2012).

See also, *Purple Communications*, 361 NLRB No. 126 (2014) where the Board held that that employees are allowed to use the employer's e-mail during non-work time for the purpose of engaging in concerted activity under Section 7.

What about free speech, especially in the public sector? Do arbitrators use federal case law to assist in determining these issues either.

ANSWER: Yes. The law on this is complicated and the scope of this discussion was not intended to delve into this too deeply but here are a few cases that arbitrators might use to determine if discipline based on a social media post in a public sector setting was based on just cause:

See, *Pickering v Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v Ceballos*, 547 U.S. 410 (2006), where the Court held, citing *Pickering*, that when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes and are not thus entitled to the protections under the Constitution afforded to private citizens. See also, *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011) and *Bland v Roberts*, (4th Cir. 2013) (appeal from 857 F. Supp. 2d 599 (2012).

These cases give rise to a set of criteria for analyzing these types of cases. First, is the speech made pursuant to their official duties? If so then the speech may not be protected.

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

Third, if the speech is a matter of public concern, does that outweigh the employer's interests in providing services? If so, it may be protected.

Here are arbitral responses to this often thorny question:

State of Ohio, Dep't of Corrections and Ohio Civil Service Employee's Local 11, unreported (March 6, 2013 Pincus); *City of North Bay and Dade County PBA*, 131 LA 275 (Wood 2012); *Vistas Nuevas Head Start and Michigan AFSCME Council 25 #1640*, 129 LA 1519, AAA 54 390 00061, (Van Dagens 2011).

These are only a few examples but the implication is clear – arbitrators frequently rely on external law and both case law and arbitral responses to determine the answer to the question of whether an employee's comments on social media are protected somehow or are cause for disciplinary action.

OTHER FEDERAL LAWS, INCLUDING OSHA AND HIPAA

Elkouri notes that "the provision of OSHA have often been considered in the disposition of safety and health issues by arbitrators." Elkouri at page 10-52. In fact, an entire chapter is devoted to the subject of health and safety and how regulations designed to protect worker are used in determining arbitration decisions, both contract interpretation and discipline.[3]

The scope of this topic will not warrant a discussion of literally every possible statutory or regulatory violation must lead to discipline. The question is whether a finding of the violation of an external law, which might also be related to the work being done by the employee, is to be considered. The short answer is that arbitrators do and many times must review external law to see if indeed a violation has in fact occurred and then whether that violation, under a just cause analysis, warranted the discipline imposed. These will necessarily be very fact specific cases and will depend on their own unique facts.

In discipline matters, employers frequently cite safety violations as the basis of discipline. See, e.g., *Carrier Corp*. 110 LA 1064 (Ipavec) involving the failure to wear safety glasses. See also, *IBT #120 and* JR *Simplot Company*, FMCS 210527-07124 (Jacobs 2021), involving alleged failure of lock out/tag out procedures. There the relevant company policies contained references to OSHA regulations themselves. In that case the employee was injured when he fell from a piece of equipment. His supervisor had specifically authorized the procedure used and there was evidence that the "only" way to perform the operation was to do it the way the injured employee was doing it. Further, other employees, some of whom had trained the grievant, had performed the same operation many times before in that same manner.

The discharge in that case was overturned both due to those factors and that there was no specific regulation requiring that it be done differently either on OSHA regs or in company policy.[4]

The question for purposes of this discussion, is whether and to what extent federal OSHA regulations or pertinent state health and safety regulations can be used as the basis of discipline. The answer seems clear, that they certainly can be used, but ultimately the question appears to be whether there is just cause for the discipline that was issued. These too, will be very fact specific cases and may

[3] The scope of this discussion is not broad enough to warrant a discussion of that entire treatise, especially the lengthy discussion of drug and alcohol testing. It is clear though that both Unions and Employer's alike will reference OSHA regulations and that arbitrators are certainly empowered to consult those regulations to determine if there has been a contract violation or whether there exists just cause for discipline.

[4] There was also evidence that the local manager recommended retraining for the injured employee as the appropriate penalty, but a manager from outside the plant in a remote location who had little if any knowledge of the plant or its operations decided that discharge was more appropriate.

depend on the nature of the alleged violation, the employee's history and training provided, and whether the other elements of just cause are met. Thus, the fact that an employee may have violated a safety regulation or OSHA standard may be important to the case, but may not necessarily control the result.

Likewise, questions arise as to whether an employee who is found to have violated HIPAA, Health Information and Portability Act, regulations must be fired. Many employers in the health care field or who deal with the health information of clients/patients have very strict policies regarding the protection of confidential patient information and where those policies require stiff discipline, including discharge for employees who disclose patient information, even sometimes, inadvertently.

The question here is whether an arbitrator can or should consult the external laws and regulations to determine of indeed a HIPAA violation has occurred. Once again, these will be very fact specific cases that will depend on the nature of the alleged violation, the terms of the policy and the overall record of whether just cause was met.

In one case, a case worker at a correctional facility was discharged for posting insulting messages about some of the clients the employee worked with, and for disclosing information that was found to be protected by HIPAA about a patient. She alleged that it was only going to a co-worker, but it was clear that the message went to others as well.

Under HIPAA, which was considered in determining just cause, that information could only be disclosed to other health care workers with a medical need to know it, and no one else, and should only have been disseminated on a secure platform so that even other workers could not see it. Her message was posted on Facebook.

The discharge was upheld based on the conduct and messages and the seriousness of the HIPAA violation. See, *State of Minnesota and AFSCME*, MN BMS 21-PA-1542 (Jacobs 2022). The Union had argued that the act of posting a patient's chart note was not a violation of HIPAA since it was intended to be private and because the person who saw it could have been later assigned to the patient's care team.

HIPAA though requires that information only be given to the person who needs to see it at the time. HIPAA was consulted at some length to deal with those allegations.

In another, the CBA contained a specific reference to OSHA and "any other applicable federal, state or municipal provisions." The issue arose during COVID as to whether the employer was required to use CDC and other federally or state mandated guidelines for COVID mitigation and whether these were inconsistent with the CBA. In that case the contract called for employees to have a doctor's note if they left work due to illness and they were out for more than 3 consecutive days.

The employer's policy listed 6 specific symptoms the employees were asked about when they returned to work and there was a temperature check. None of that was in the CBA and the employer unilaterally required a doctor's note literally every time an employee returned to work even if the employee had none of the listed symptoms.

The employee left with a headache and returned for his regular shift 5 days later and was fine. The employer refused to allow him to return to work until he had a note and charged him with an attendance point. He returned several more times without a note claiming he didn't need one and the Employer kept charging him with attendance points for the failure to appear for work. He was eventually discharged for accumulating more than 12 points.

The discharge was overturned on the basis, among other things, that the CBA controlled the result, not the policy and that a doctor's note was not required in that instance. It was important to note too that the employees was not fired for insubordination, but rather solely due to the attendance points. *IBT 41 and Traditional Logistics*, FMCS # 210825-09511 (Jacobs 2022). There were other quirky issues in that case, but overall, the evidence was clear that the policy was in conflict with the CBA and that the CBA controlled the result, not a unilaterally mandated policy.

COVID ISSUES

The pandemic caused over a million deaths in this country and caused illnesses to people who are in some cases still suffering from it. It also created terrible problems for employers and unions alike in trying to deal with balancing the need to keep employees and the public safe against the privacy and health interests of employees. The external forces that arose out of the various vaccine mandates are still being arbitrated to this day. Below are just a few examples of who those issues have arisen.

State of Washington, LCB and WAFOP, Washington State # 135004-P-2 (Jacobs 2023). The Governor of Washington instituted a vaccine mandate for all State of Washington employees. There was a process by which people could request an exemption from the mandate for religious or medical reasons. The employee sought and was granted a religious exemption.

The next step was to find him an accommodation and the parties' MOU regarding the COVID mandate provided that "the Employer will attempt to accommodate the employee in their current position prior to looking at accommodations in alternative vacant positions."

The grievant was responsible for enforcing state, liquor and marijuana laws and was required to be on site in the establishments where those items were sold. That included at times using underage "buyer" to check on whether ID was checked at point of sale. He regularly interacted in person with customers of those stores, employees of the stores as well as members of his team and the public.

He could not perform the essential functions of his job virtually. He was offered 3 other alternate jobs but turned them all down. He argued that the ADA required that he be accommodated and noted that the local MOU even referenced the ADA.

The State argued successfully that neither the local MOU nor the ADA required that the employer create a job specifically for this one individual. Nor did the ADA require the elimination of an essential function of a person's job. The State also cited numerous cases from 9th and 5th Circuit Appellate courts that the transfer to a lower paying position did not violate the law. See, *APWU v USPS*, 781 F.2d 770, *Sanchez-Rodriguez v. AT&T Mobility P.R.*, Inc., 673 F.3d 1 (1st Cir. 2012); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1324 n. 6 (11th Cir. 2007); *Bruff v. N. Miss. Health Servs. Inc.*, 244 F.3d 495, n. 23 (5th Cir. 2001) and *Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988).

The State also argued successfully that the proposals offered by the grievant to keep his current job would have created a hardship for the employer due to the elimination of much of the essential functions of his job and would also make it unsafe for him to continue to have public contact while not being vaccinated.

The issue of whether that was medically true or not did come figure into the calculation since it was clear that the governor had the power to issue the mandate. Further, even though the religious exemption was granted, the grievant could not be accommodated in his current position. The fact that he then turned down 3 other jobs sealed his fate. The grievance was denied and the grievant was placed on non-disciplinary separation.

WHAT IF THE CONTRACT SPECIFICALLY INCORPORATES A STATUTE?

As discussed above, the Court in *Penn Plaza v Pyett***,** 556 U.S. 247, 186 LRRM 2065 (2009) raised the possibility that if a CBA has a specific reference to a statute in it, the arbitrator is empowered to rule based on that statute and possibly its interpretive caselaw as well.

In *USVI Port Authority and UIW SIU*, USVI PERB 001-32 (Jacobs 2023) the contract specifically referenced a statute regarding an incentive program that would result in increased pay for a higher level of education. Under those circumstances it was clear that the ruling had to take into account the statutory language in order to correctly interpret the contractual language. The ruling also had to be consistent with the law itself and that the ruling might well need to be consistent with the statute even though generally, inconsistency with a statute might not be a ground for judicial review. See above where Elkouri and others comment that inconsistency with statutory provisions might not warrant overturning an arbitral decision.

As the Court intimated in *Penn Plaza*, parties should be aware that a reference to a statute in the CBA may well give the arbitrator more power than some parties might think and it may limit the arbitrator's ruling significantly depending on what that statute says.

POTENTIAL CONFLICT OF LAWS

There can be situations where there is an apparent conflict of external laws that might impact a case. For example, what if there is a local or state law that is different from a federal law? This arises frequently in marijuana cases, discussed below, since use of marijuana is illegal under federal law but legal in many states.

Arbitrators are generally not empowered to resolve that conflict or to somehow harmonize the difference between federal and state law or even where there are apparent conflicts between state laws. That determination should legitimately be left to the courts or, better yet, the relevant legislature.

It can also arise in situations where a local or state law or ordinance is different from the FLSA for example. In *Steelworkers and Interplastic Corp*, FMCS 190129-03655 (Befort 2019) the arbitrator dealt with just such a situation. The City of Minneapolis passed a local ordinance, entitled the Safe and Sick Leave ordinance, requiring certain sized employers to provide their employees with up to 48 hours of paid sick leave per year for absences due to illness or domestic abuse.

The parties in that case agreed that the terms of their CBA did not comply with that ordinance because it did not provide for paid sick leave or permit for the use of paid vacation time for sick leave. The employer in that case adopted a modified policy by which employees could use paid vacation time for sick leave or safe leave purposes.

The arbitrator noted the conflicts between the CBA and the local ordinance and further noted that in order to resolve the apparent conflicts an employer would have to negotiate a change in the CBA, adopt a policy that complied with the ordinance or provide for sick time over and above the terms of the CBA. The employer proposed reopening the agreement but the Union declined to agree to that so the employer opted for the second option – adopt a policy allowing for use of vacation time for sick and safe leave purposes.

The Union still argued that the policy violated the terms of the CBA by reducing the paid vacation time. The arbitrator sustained the grievance and ruled that the employer could in that circumstance provide sick leave above what the CBA called for, i.e., the third option outlined above.

In that case it was clear that the arbitrator was persuaded that the local law governed the parties' relationship and that the employer was compelled to abide by the ordinance and that it could act consistently with CBA by simply providing a benefit that was never in the CBA, but required by local law.

MARIJUANA LAWS

As referenced above, the scope of this topic is limited to whether and to what extent arbitrators will look to and consult external law in interpreting and applying the terms of a labor agreement. This is not intended to be an exhaustive treatise or discussion of how marijuana laws around the country have impacted discipline cases.

Obviously, marijuana is still illegal under federal law. However, it is legal in many states, either for medicinal use or even recreationally. The question in some cases arises where an employee is disciplined for marijuana use or impairment. A discussion of some recent cases may shed some light on the subject.

The arbitrator in *City of Portland and Laborers #483*, 123 LA 1444 (Gaba 2007), recognized that Oregon had a "very lenient approach to marijuana", set aside the discharge of an employee who tested positive for marijuana. The marijuana was found in the employee's car and the arbitrator found that it had been left there inadvertently. The arbitrator stated that the employer's policy was "silly" in that the rule was overbroad and would have literally prevented an employee from bringing home a 6-pack of beer. It was clear that the arbitrator had consulted and even relied on state law to overturn the discipline.

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

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

Significantly, the drug policy was *expressly incorporated into the parties' collective bargaining agreement.* Thus, the parties had agreed, that as a matter of contract, being under the influence was a disciplinable matter and effectively agreed that the cutoff point prescribed by the employer meant "under the influence." In stark contrast to the agreed upon language in the CBA, the arbitrator found that it was not.

The rule as provided in the parties' labor agreement in *Freightliner* was as follows:

> Reporting for duty or working under the influence of any drug or alcohol (whether or not legally intoxicated) is specifically prohibited and will be cause for suspension without pay or discharge, depending on the circumstances. See, 336 F. Supp. 2d at 1121.[5]

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

[5] The CBA also defined the level of ng/ml that constituted "under the influence;" a factor not found in many CBA's.

In the very next paragraph though, the policy said, "Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or [the employer's] operations."[6] Local law was used there because it was implicitly incorporated into the parties' contract.

There are several unpublished decisions involving postal employees where there was a reference in the policies at the local offices that implicitly recognized that employees might have a medical use for marijuana or that there are states where its use is legal under state law.

In one such case the policy said, "where there is evidence of a medical reason for the use of a drug, the test counts as a negative test**.**" Under a just cause analysis, I ruled that the policy must thus be applied as it is written and that the test in this instance had to "be counted as a negative test." Under those facts, the discharge based on a positive test was overturned.

In the other case, he acknowledged that he had smoked marijuana a few days before – in a state where it was legal to do so recreationally. The employee was reinstated since there was a lack of evidence that he was actually impaired as of the time he was at work and no "hard" evidence that he used the pipe to smoke marijuana while on duty.

See also, *Paperworkers v Misco*, 484 US 29 (1987) where the US Supreme upheld an arbitrator's decision where the employee had not violated a rule against possession of marijuana on the employer's premises. The 5th Circuit overturned the arbitrator' award on public policy grounds, but that was reversed by the Supreme Court, holding that the award "drew its essence from the CBA." *Misco* has frequently been cited for the proposition that an arbitral award may be overturned as violative of public policy, but it is important to remember that it arose out of a marijuana related incident.[7] It was clear that the arbitrator would have had to address external law in making that decision, even though at the time marijuana was illegal under both federal and state law.

The question was thus not whether use of marijuana was or was not legal, but rather whether there was just cause for discharge for its use under those unique circumstances.

Obviously, the topic of marijuana use is far broader than this discussion allows. It is clear that drug and alcohol cases generally, external may well play a large part in the decisions. Whether use of a drug, such as marijuana, results in discharge though is a question of an arbitrator to answer based on more than just the use or impairment question. As always, that too depends on the facts.

GRIEVANT IN JAIL AND OTHER CRIMES AND MISDEMEANORS.

This is tangentially related to external law in that the grievant must have violated something in order to be incarcerated.

Arbitrators may have a difference of opinion here as well depending on whether the conduct for which the employee was incarcerated occurred on the job or off.

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[6] Marijuana cannot be formally "prescribed" by physicians and can only be recommended, since it remains illegal under federal law.

[7] The question of whether a decision violates "public policy" is beyond the scope of this discussion. However, such cases may involve the question of whether a decision reinstating an employee, usually for conduct that violates both an employer policy as well as some inchoate public policy, calls for a review of external law as part of the just cause analysis.

The main issue though may well be not that the grievant was convicted of some crime, but rather that the employee is not at work for an extended period of time and the employer has no obligation to hold the job open indefinitely. There may also be issues regarding the type of crime committed and whether the employer can be reinstated, either because there is a legal problem in doing so based on the actual job requirements or there may be a trust issue going forward.

In many cases the real question is not so much consideration of external law but rather the employee being AWOL. In *ATU #468 and Greater Cleveland Regional Transit Authority* FMCS Case # 10-57698-8 (Jacobs 2010.) The grievant was a short-term employee who was in jail for about a month. His absence ran afoul of the Authority's attendance policy. It was frankly of very little consequence why he was in jail but the discharge was upheld based on the attendance issue.

Likewise in *USPS AND NALC*, 4J 19N-4J-D 21423412, (Jacobs 2021) the grievant was incarcerated for approximately 11 months after being convicted of various crimes, none of which were related to his employment. The employer argued that his conviction of conspiracy charges could potentially be a problem and raised a trust issue because he could potentially be delivering drugs to customers.

That was found to be of little evidentiary value however, since he would likely not know what was in the packages he was delivering and since the crime for which he was eventually convicted happened years before he was even employed with the Postal Service.

The discharge was upheld though, based again on attendance and the fact that his initial sentence was for 3 years. The employee claimed he would be let out early, but in 11 months that never happened.

Arbitrators are frequently confronted with the issue of whether a criminal conviction disqualifies the employee from employment. Getting a DUI can greatly jeopardize a CDL driver's license. If that is a requirement of the job, it will be difficult for an arbitrator to order reinstatement, incarceration or not.

Likewise, if an employee is convicted of a crime of moral turpitude, such as fraud or theft, which may raise legitimate trust issues and depending on the facts, which may also be a factor an arbitrator will take into account. See generally Elkouri at section 15.3.A.iii, discussing the effect of criminal conviction. See also, *Alpha Beta Company* 91 LA 1225 (Wilmoth 1988) where the arbitrator upheld a discharge after the employee has been found to have been convicted of criminal conduct prior to her employment. The arbitrator was persuaded that if the Employer had known of the conviction it would not have hired the employee.

See also, *Kitsap County* WA, 118 LA 1173 (Gaba 2003) where the arbitrator upheld a discharge of a deputy sheriff who had been convicted of fraud prior to his employment and then was untruthful during an IAD investigation.

But see, *Glenshire Woods*, 121 LA 1665 (D'Elleto 2005) where the arbitrator overturned a discharge where the employee had lied on her application for employment but the matter was not discovered for 10 years. The arbitrator held that the employer had a duty to fully investigate and verify the employment application at the time it was completed.

These cases are examples of arbitrators who are faced with criminal conduct and then have to deal with the effects of external law, apart from the CBA itself in determining just cause. It is clear though that the mere fact of a criminal conviction does not always control he decision. Just cause is still required although the criminal conduct is a significant factor in most cases.

WORKERS COMPENSATION ISSUES[8]

Workers compensation issues and injuries on duty are generally never matters that are covered by the CBA. In one case though the employee argued that the labor contract compelled the employer to follow the proper statutory procedures in filing the proper paperwork with the insurance company to get her benefits. The employee claimed an injury on the job and claimed that she told the employer about it, but they never filed the paperwork to get the claim paid. She filed a grievance under the labor agreement alleging that there was jurisdiction for the arbitrator to order the Employer to follow the statute in filing the paperwork. See, *Government of the U.S. Virgin Islands and United Industrial Workers Union,* USVI case # 016-16X (Jacobs 2022). There was no jurisdiction under the labor contract to compel the government to file the proper paperwork with the insurer and that part of the grievance was denied.

Those issues can have a significant impact on cases depending on the facts. Testimony given at a workers compensation hearing can also have a significant impact on the outcome of an arbitration as well. Workers compensation trials are generally administrative proceedings before a workers compensation judge. They are on the record however and the testimony is given under oath. That testimony can in most cases be used to impeach a witness later on – in an arbitration for example.

An arbitrator can generally take testimony given under oath either at trial or in a sworn deposition into account in assessing the credibility of a witness testifying at an arbitration, just as they might in any other civil or criminal proceedings. Prior testimony can be taken into account for that purpose generally.

One other potential issue arises with respect to work injury cases regarding whether an employee can be reinstated if they are no longer able to perform the essential functions of the job. Note that this may entail both workers compensation and ADA issues. In one case, the employee was ordered to be reinstated, but only after he recovered from his injuries sufficiently to allow him to return to work full duty – which may never happen given the seriousness of his injuries. See, *State of Minnesota and AFSCME,* Minnesota BMS 21-PA-0125 (Jacobs 2020).

Thus, in cases where there may also be a workers compensation claim, the arbitrator may well be faced with the prior testimony about the work environment and other factors that may have seemed inconsequential in the workers compensation claim, but which may loom large per other issues, such as whether just cause exists for a termination – whether that termination is based on the same incident as the injury claim or not. As always, it depends on the facts of each case.

COMMON LAW - CONTRACT INTERPRETATION PRINCIPLES AND DAMAGES

Common law issues arise all the time in arbitration. The two most prevalent items that arise much of the time are contract interpretation principles that aid arbitrators in interpreting and applying disputed language and in calculation of damages and mitigation. These principles are just a few guiding rules that originate from the common law but are used all the time.

The scope of this topic and time does not allow for a full discussion of all of the principles arbitrators use but citations to the *Restatement 2nd of Contracts* occurs frequently by advocates and arbitrators alike in arguing for a particular interpretation.[9]

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[8] Note, that in many states, testimony given at an unemployment compensation hearing is in many cases not admissible for any purpose, even though it too is given under oath. in Minnesota the statute specifically prohibits its use in any other proceeding, including labor arbitration. See Minn. Stat, 268.105. Practitioners should be aware of their particular state law to determine if the outcome or the testimony at an unemployment compensations hearing can even be used.

[9] See also, *Simpson on Contracts*, 2nd Edition West Publishing, 1965.

CONTRACT INTERPRETATION PRINCIPLES

Arbitrators frequently use concepts and principles from the common law regarding the interpretation of "regular" contracts involving real estate or commercial contracts to interpret disputed provisions of labor contracts as well. Some of the principles in various textbooks and treatises are as follows:

What do the disputed clauses modify or affect?

The Golden Rule, cited in *A Dictionary of Modern English Usage* (Fowler Ed., Oxford Univ. Press, 2nd Ed, 1965) is that the words or numbers most nearly related should be placed in the sentence as near to one another as possible, so as to make their mutual relation clearly apparent. See also Elkouri, *How Arbitration Works*, 6th Ed. at p. 441, n. 43.

This may mean going back to grammar school and literally diagraming sentences to see which words modify or relate to other words or phrases to determine the meaning from the language itself.

Are the meanings consistent throughout the contract?

One time-honored interpretive tool is that words or phrases are to be given the same meaning throughout the contract unless there is clear evidence to the contrary. Arbitrators frequently use the standards that the contract must be interpreted as a whole and this is one place where that adage is frequently tested.

How is a word or phrase used in other parts of the contract? If they are the same, they may well carry the same meaning. If, however different words are used, the arbitrator may well find that the parties intended a different meaning.

Expresio exclusio rule - Specifically listing one thing or a set of things excludes others.

This is the "expresio unius est exclusion alterius" rule that essentially means is that if you list something it implies that other things are not on the list. See, Elkouri, 6th Ed at 467-468. This too comes from the common law but is a frequently used principle in contract cases.

DAMAGES CALCULATIONS AND MITIGATION

Another frequently cited issue from common law deals with contract damages and back pay award where there is a claimed breach of the language or where there was insufficient just cause to warrant discharge and the employee is reinstated on some basis.

The general rule under common law is that where there is a breach of contract the aggrieved party is entitled to such damages as will make them whole but no more. There are also clear principles that in some cases a party must make reasonable efforts to mitigate damages, in order to avoid double compensation. See Restatement of Contracts 2nd at sections 346 -351. The measure of damages generally is to place the non-breaching party in the same position they would have been in had the contract been performed and there had been no breach. See also, Simpson on Contracts at Section 195, page 392. "every breach of contact entitled the party injured to sue for damages. The rule as to the measure of damages is that the plaintiff is, so far as money can do it, to be placed in the same situation as if the contract had been performed." Generally damages are not awarded beyond that.

Both treatises contain sections on punitive damages and there may be some grounds for that but these are limited and based on very fact specific situations.

In *10 Roads and APWU*, FMCS #231229-02217 (Jacobs 2023), the employee was on social security retirement benefits, but was still working when she was fired. The original decision was to reinstate her with full back pay. The Employer raised two issues with respect to the back pay: First, that the employee's SSDI payments should be deducted from her back pay. Since she was already on it when she was fired, that claimed was record since the grievant was already receiving those payments.

The second claim was that the grievant had not reasonably mitigated her damages by seeking alternate work in the interim. Normally, that might be a valid defense to a damages claim and would require some showing that the employee did more than simply sit around waiting for their grievance to be heard. In that case though the time span between the termination and the eventual arbitration award was about 4 months. It was clear too that within less than 2 months the hearing had been scheduled. Under those unique circumstances the grievant was awarded her full back pay without any deduction for the SSI she was on or any claimed lack of reasonable job search. There was also no deduction for UIC benefits she might have gotten since the Employer could also have challenged that.

SEIU and St. Francis Medical Center, FMCS #220526-06322 (Jacobs 2023) common law measures of damages were used where the Employer was found to have violated the CBA when it used outside employees instead of bargaining unit employees to fill overtime slots. The Union argued that the employees for any overtime shift where the affected employees was to the most senior and claimed that, but for the use of an outside employees the unit employee would have taken it – even if that meant working up to 27 days in a row with multiple double back shifts included.

That was ruled to be too speculative and the measure of monetary damages was limited to only those shifts where it could be shown that the employee actually did sign up for the overtime but got bumped out of it by the use of an outside agency employee.

CONCLUSION

The foregoing should make it relatively clear that at the end of the day, the CBA controls the result in a contract case and that just cause and all of its elements are still required in a discipline/discharge case. The fact of external laws or external legal factors can be both a minor issue or a game changer depending on the facts of each case, however in virtually all such cases, the external factors should never be ignored or taken for granted. It is clear from the commentators, that arbitrators can and often should consult external law as an aid in interpreting the labor agreement, but must always be cognizant that their role is limited to the interpretation of the CBA, not the law. While the law can be a valid factor in determining a case, it is a factor and may not control the outcome by itself. As always, it depend on the facts.

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