home after such scares will continue to present questions for arbitrators. In the former situations, arbitrators will likely continue to examine the facts to determine if there does exist reasonable justification for the employee's fears and, if there does, to uphold his right to refuse to work. In the latter, however, the conflict between strict and liberal constructionists is likely to continue where contractual terms relating to reporting pay do not include the all-inclusive exception "conditions beyond the control of the employer."

In the cases involving personal attire and the wearing of emblems, arbitrators will continue to require that companies must demonstrate that the wearing of the attire or the emblem either is disruptive of the production process or is needed because of adverse impacts on legitimate business interests. Where such proof is offered, disciplinary actions are likely to be supported, but the case will have to demonstrate a genuine and serious injury to the company's interest before discharge will be upheld.

Overall, therefore, while the new life style has given rise to changed situations in arbitration cases, it would appear that arbitral standards and principles already established are adequate to cope with most of the cases that arise. From this study I conclude that two basic questions emerge. One is to what extent should employers be required to assist employees addicted to narcotics to eliminate the habit and rehabilitate themselves to become productive members of society. The other is to what degree should arbitrators adopt a liberal construction approach to contract language when they are faced with a case involving a situation that the parties obviously never dreamed about when they were writing their contract language and where an adverse decision could result in serious injury to the employer or employees.

III. ARBITRATORS AND CHANGING LIFE STYLES—ESTABLISHMENT OR IMPARTIAL?

MARTIN A. COHEN *

In 1970, at the 23rd annual meeting of the Academy, Ralph Seward, in his address "Grievance Arbitration—The Old Frontier," asserted: "We are a part of the Establishment—so much a

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part of it that we are getting bored with ourselves." [1] Seward then went on to say, "Our program committees at the Academy have more and more difficulty in finding subjects connected with grievance arbitration that haven't been worked to death." [2] Bernard Kleiman, general counsel of the United Steelworkers of America, a most articulate proponent of the arbitration process and a keenly perceptive observer of the labor arbitration scene, at our 21st annual meeting reported that at the lower echelons of the union structure there are some misgivings about arbitrators and the arbitration process. He stated that these negative attitudes, held by some employees, are not born of widespread suspicions of venality or misconduct, but rather have their roots in employees' misgivings because they perceive management and arbitrators as coming from the same social environment.[3]

Last September, when I was asked by the Program Committee to participate in this discussion of changing patterns of plant rule and plant discipline growing out of the new morality and new life styles, I must confess my desire to experience what Ben Aaron has called that "perverse delight" we arbitrators derive from "examining our real or imagined deficiencies" was stirred.[4] What a beautiful masochistic feast seemed to be in the offing. We were going to take a close look at how establishment neutrals (average age 60, plus or minus), trained largely in either law or economics, have handled cases involving long hair, beards, and drugs, not to mention bomb scares, a behavior syndrome so clearly anti-establishment and youth oriented. Oh! Wouldn't our generation establishment bias show? What, if anything, could we possibly salvage of our esteemed impartiality after this was exposed?

A little sober reflection began to dull my enthusiasm for indulging my perverse self-destructive impulses. Healthier instincts of self-preservation must have taken hold, as I became anxious about what the record on our objectivity and impartiality would show on these emotionally charged issues. Solace was not long in

[1] *Arbitrators and the Expanding Role of Neutrals,* Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 155.

[2] *Id.* at 156.

[3] See Kleiman, "Discussion—The Impact of Acceptability on the Arbitrator," in *Developments in American and Foreign Arbitration,* Proceedings at the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 112-118.

[4] See Platt, *id.* at 118.

coming. First, there came the program announcement for the meeting where the topic was listed as "Changing Life Styles and Problems of Authority in the Plant."

Depth psychology has taught us that the words we use are not accidental. They reflect our innermost feelings and biases. At a time when the behavior patterns we are discussing are benignly referred to as "counter-culture," "anti-establishment," "consciousness III," and frequently are identified as "beat," "hippie," "yippie," "dropout," "up the establishment," not to mention "new Left," "kookie," and "anarchistic nihilism," our establishment Program Committee rose to an Olympian height of objectivity. What can be more open and fair minded, more unbiased, than the term "changing life styles"? Indeed, instincts of survival are still man's best protection against himself. I began to calm my worst fears a little.

Rolf Valtin's paper, an excellent objective case-study analysis of how abritrators were handling cases in the area of hair and beards was also most reassuring. First, I was intrigued and inspired by his one-man "tripartite" board consisting of Rolf Valtin, impartial chairman, and his two inner-voice board members. When management was testifying, one inner-voice board member was urging the chairman, "Why in hell can't you let him wear it?" While the union was presenting its case, the other inner-voice board member was urging the chairman, "Why in hell can't you shave it off?" What a marvelous revelation of a person's great capacity for not getting emotionally involved when he is charged with judging an emotionally charged issue on its merits. This may indeed be the answer to the problem of assembling useful tripartite boards without additional cost to the parties or overburdening of crowded calendars. If one gifted arbitrator can achieve such a state of true, judicial, objective calm, there is hope for the rest of us, if only we would search ourselves for the messages of our inner voices.

Equally reassuring was Valtin's conclusion, based upon his careful review of the cases, that no new arbitral law had emerged. New-life-style cases involving hair and beards had not produced any departures from established arbitral standards. He found that arbitrators relied on such well-established arbitral standards as: Management rules can be challenged by the union through the grievance procedure and are subject to the scrutiny of arbitra-

tors. Hair-and-beard rules must be clear and nondiscriminatory, as well as nondiscriminatorily applied. Rules must be reasonable, balancing the right of the individual to exercise his personal preference as to hair-and-beard style with the employer's right to manage his personnel in a manner that will not be detrimental to his legitimate business interests. Yet, it was clear from the record that establishment arbitrators, using well-established arbitral standards, were coming up with both pro-establishment and anti-establishment decisions. Our bias was clearly not showing.

Perverse impulses are not easily repressed forever, especially if a crisis seems to be over. I again found myself having some gnawing doubts. Perhaps the seemingly neutral won/lost record was due to the fact that so many of the cases turned on such well-established rules of establishment neutrals as proper notice of a clear rule, a discriminatory rule discriminatorily applied, or health and safety. What about those cases where the sole crucial issue was the reasonableness of the rule when management asserted that the company image would be damaged and fear was expressed about the negative impact of this loss of image on business? Did arbitrators tend to treat these fears as either real or imagined, depending upon the hard, factual evidence or lack thereof, or were many of these cases decided by what Rolf Valtin termed "instinct and gut reactions"? There are certainly cases on any issue where there is little in the record to support anything but a gut-reaction judgment, and I think we could agree that many sound decisions can and do result from gut-reaction judgment. An arbitrator with absolute confidence in the excellence of his one-man tripartite board might risk that route in these kinds of cases without fear that his bias might be showing. I myself am just more comfortable with, and have a decided preference for, those decisions where the arbitrator shies away from turning the case largely on subjective judgment and instead looks to the factual evidence, or lack thereof, in the record for guidance. May I make clear that my own preference in this area in no way is intended, or does it even mean to imply, that those arbitrators whose decisions appear to be based largely on subjective judgments either rendered unsound decisions, or did not render decisions on the merits, based upon their best and most honest judgment. I do feel, however, that these decisions are more difficult to defend against the criticism that one's bias or one's own value judgments may have colored the decision.

Let us now take a closer look at some of the cases where the primary issue was balancing the rights of the individual against the company claim that its image and its legitimate business interests would be hurt if the rule against long hair, sideburns, and beards were not enforced.

First, let us look at the cases cited in Valtin's paper. In the *Greyhound Lines, Inc.*[5] case, involving the ticket clerk, a part-time magician with a goatee, Arbitrator Burns set the discharge aside on the grounds that: "The damage caused by grievant's beard to its public image and business has not been proved. . . . The interference with grievant's private life is not justified where no damage to the company is shown when grievant wears his beard." Without raising questions on degree of proof, I think we can agree that lack of proof, as noted by Arbitrator Burns in this case, can be considered as having objective evidential value, especially in a discipline-discharge case.

San Diego Gas & Electric Co.[6] turned on discriminatory treatment and thus is not useful in this analysis. *United Parcel Service,*[7] decided by Arbitrator Leo Kotin, relied largely on a three eighths of an inch "range of tolerance" rule and also is of doubtful relevance for this analysis. Also, it is debatable whether *Kellogg Co.,*[8] where the facts are so intertwined with food and health, clearly meets the criteria of this analysis, and it is also being omitted. Similarly, the "wig" case would not fit into our stated frame of reference.

Arbitrator Fleischli in *Arrow Redi-Mix Concrete, Inc.,*[9] a case involving a written warning notice to a ready-mix truck driver in Green Bay, Wis., for growing a beard in violation of the company rule, sustained the grievant and noted the following in his opinion:

> "The balance [rights of employee and rights of company] will be greatly affected by the existence of any evidence that the conduct has in fact had an adverse effect on the Company's business image or sales. . . . [T]he evidence discloses that part of the employer's motivation in establishing the 'clean shaven' work rule is Bernard

[5] 56 LA 458 (1971), Robert E. Burns. See also *Roger Wilco Stores,* 70-2 ARB 8463, where Arbitrator Burns found for a bearded grievant but without the "magician" moonlighting aspect involved in *Greyhound Lines.*
[6] 57 LA 821 (1971), John W. Leonard.
[7] 52 LA 1068 (1968), Leo Kotin.
[8] 55 LA 84 (1970), John C. Shearer.
[9] 56 LA 597 (1971), George R. Fleischli.

> du Chateu's personal dislike for beards because of his identification of beards with 'hippies.' The arbitrator does not consider such personal likes or dislikes to be a legitimate basis for the establishment of a rule which impinges on the conduct of employees both on and off the job."

In *Safeway Trails, Inc.*,[10] Arbitrator Dugan, in a case involving a ticket agent in Philadelphia, Pa., who was discharged for long hair (touched his shirt collar) sustained the discharge, noting in his opinion:

> "Here the Company is in the bus business transporting people; more than fifty percent of them are over fifty years of age and in the low income group; these people, as anyone who has talked to them knows, despise long hair. This being so and the bus business being as competitive as it is, the public image of a bus company and its business could well be hurt by employees who do not wear 'square' haircuts."

Granting that its business could well be hurt by long-haired ticket agents, was it, in fact, hurt by the grievant's long hair? How many complaints did the company, in fact, receive from "over-fifty," low-income-group riders who "despise long hair"? Indeed, Arbitrator Dugan may have been entirely sound in all of his conclusions. I would have been extremely reluctant to make these judgments in the absence of some objective, verifiable proof.

When preparing this paper, I did not have access to Steelworkers Arbitration Awards, and thus I have not had the opportunity to read the award in the *Youngstown Sheet & Tube* case,[11] in which Arbitrator Richard Mittenthal upheld the company rule requiring all plant protection officers to be clean shaven. Relying on Valtin's summary of the case, I feel that I would have had what Valtin called a "hard time with this case." In the absence of some factual proof that the guard's small, neatly trimmed beard was provocative and did mar proper dealings by the officer with plant employees and the public, I would be extremely reluctant to rely primarily on a largely subjective judgment in resolving the issue.

The last applicable case cited by Valtin was *Pepsi Cola General Bottlers, Inc.*,[12] a case involving the grievance of a route salesman discharged for violating the company's grooming code.

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[10] 57 LA 994 (1971), Frank J. Dugan.

[11] Steelworkers Arbitration Awards, Rep. 270 (1971), cited in Valtin, "Hair and Beards in Arbitration," note 9.

[12] 55 LA 663 (1970), Marlin Volz.

The grievant's sideburns extended about one inch below the earlobe, the length of hair did not conform to an inch above the collar, and his mustache extended beyond the lip and was not neatly trimmed. Among other things, the union argued that the company caters in its advertising to the "Now" generation, and that the grievant's appearance did not adversely affect the company's business because his monthly sales had increased. Arbitrator Volz denied the grievance and noted in the opinion: "Nor does the fact that the grievant's monthly sales were on the increase discredit the Company's assumption that Route Salesmen with excessively long hair and excessive facial hair lessen the esteem of the public for the Company."

A review of the applicable cases listed under heading 188.6564 Personal Appearance, covering BNA *Labor Arbitration Reports* Volumes 51-55,[13] omitting the cases already discussed in Valtin's paper, reveals that in three of the cases,[14] the arbitrators relied primarily on the presence or absence of proof on the impact of the hirsute on business, while in three other cases[15] such proof of the actual impact on business was not required. I shall sample some quotes from only one of each of the two respective approaches.

In *Economy Super Mart*,[16] a case involving the discharge of a journeyman meatcutter for his "mutton chop" sideburns, which his supervisor kept referring to as "lamb chops," Arbitrator Alex Elson reinstated the butcher, stating in his opinion:

> "There are some vague references in the record to the effect that several customers referred to the grievant's appearance. One referred to him as a 'hippy,' but this testimony does not establish that grievant's appearance substantially affected the business of the meat department."

Elson, with considerable tact, slipped the following light note into the opinion: "His supervisor referred to the grievant's side-

[13] *Labor Arbitration Cumulative Digest and Index*, September 1968–February 1971 (Washington: BNA, 1971), 192-193.

[14] *Economy Super Mart and Meat Cutters, Local 612*, 54 LA 816 (1970), Alex Elson; *Dravo-Doyle Co. and Operating Engineers, Local 66*, 54 LA 604 (1970), Samuel Krimsly; *Pacific Gas & Electric Co. and Electrical Workers, IBEW Local 1245*, 55 LA 459 (1970), William Eaton.

[15] *United Parcel Service, Inc. and Teamsters, Local 804*, 51 LA 292 (1968), Burton B. Turkus; *Western Air Lines, Inc., and Railway & Airline Clerks*, 52 LA 1282 (1969), Charles W. Steese; *Allied Employers, Inc., and Retail Clerks, Local 1105*, 55 LA 1020 (1970), Paul L. Kleinsorge.

[16] 54 LA 816 (1970), Alex Elson.

burns as 'lamb chops.' Historically, of course, they are known as 'mutton chops,' but it may be assumed that the supervisor chose the term 'lamb chops' because of the relative youth of the grievant."

In *Western Air Lines, Inc.*,[17] Arbitrator Steese sustained the discharge of two ramp agents employed by the company in Anchorage, Alaska, for growing long hair and beards in violation of company rules. In his opinion, the arbitrator noted:

> "Through the medium of television we see much violence taking place. Whenever this happens, we notice that most of the men involved have long hair and/or beards of varying style. Whether right or wrong, the vast majority of the public has come to associate long hair and beards with irresponsibility. To permit this appearance could therefore be detrimental to the company and its business."

It is hard to resist from speculating on how the arbitrator, in *Western Air Lines,* would have handled evidence, if presented by the union, on the media portraying men with long hair and beards as pacifists who would rather make love than war. I trust such evidence would not have been too hard to come by. Of course, the pacifist image, too, could be detrimental to the company and its business. So, I guess, the conflict in testimony would probably be moot and not have to be resolved.

Without further belaboring the point, it is probably abundantly clear that I am concerned about decisions where little attention is given to factual proof, or lack thereof, of whether a particular hirsute style will or has had an adverse impact on the employer's legitimate business interest. This, of course, is not the only relevant evidence upon which to base a judgment in every case, but to consciously raise the questions would materially assist in assuring ourselves that our own value judgments are not coloring our decisions.

I am pleased to find that Tom McDermott, in his paper on changing life styles, shares the view that "if management is to claim that its requirements relating to external appearance result in some form of adverse impact on its business interests, it should be required to submit specific proof to support this position." [18]

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[17] 52 LA 1282 (1969), Charles W. Steese.

[18] McDermott, "Drugs, Bombs and Bomb Scares, and Personal Attire," *supra* at 253.

McDermott's major findings, after researching the drug, bomb, and personal-attire areas, confirms the major findings of Valtin's research in the hair-and-beard area. McDermott's research also discloses that no new or startling arbitration principles have resulted from new-life-style cases. Rolf Valtin comments that some will raise the question of whether it should be otherwise. These people may wonder about the wisdom and need for greater sensitivity and, continues Valtin, "they will argue that there is little chance for ameliorating some of the conflicts in our society if even *arbitrators* show themselves to be 'establishment' people." [19] I cannot tell from Valtin's paper whether he does or does not share some of these concerns.

I was reassured that establishment people serving as arbitrators, to resolve grievance disputes, have been able to rely largely on established arbitral standards in deciding these cases and have come up with both establishment and anti-establishment decisions. It may be one of the better tests, in recent years, of the sound foundation of our arbitral standards as the rational basis for our impartiality. Otherwise, are we not in danger of making judgments zigzagging from one personal bias to another? Some might assert that the decision-making process is, ultimately, a matter of sound judgment, and after long years of proven acceptability, we trust our objectivity and the basic soundness of our judgments. Long years of proven acceptability is certainly persuasive evidence that the above assertion has merit. Yet, in these new-life-style cases, involving predominantly the younger members of the labor force, I feel that it is particularly important that we clearly indicate to the parties that our decisions are rooted in well-established arbitral standards, whenever these standards are applicable. The generational chasm which exists in our society is not just another recurring manifestation of that eternal story of all the generations where youth appears to be in revolt against their elders. Today, the pervasive questioning of existing values and establishment credibility by young people (a large proportion of our present labor force) should not be treated lightly as "thus was it ever." As arbitrators, we can make a small contribution to ameliorating the conflicts and credibility cynicism in our society by impressing those who feel the impact of our brand of industrial justice that establishment neutrals can be "establishment" and "neutral." More significant contributions to ameliorat-

[19] Valtin, "Hair and Beards in Arbitration," *supra* at 252.

ing the deep conflicts in our world we will have to make as parents, teachers, or citizens.

If we are to maintain and improve our capacity for guarding against our own biases coloring our decisions, we must have more frequent executive sessions with our own personal tripartite boards and attentively listen to the views of our respective inner-voice board members.