CHAPTER 5

THE ARBITRATION OF EMPLOYEE DRUG ABUSE CASES

I. AN ARBITRATOR'S PERSPECTIVE

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Our session today is, in a sense, a sequel to one held at the 1975 Annual Meeting of the Academy.[1] At that meeting a panel considered the issue of employee alcoholism; today we are here to explore a related problem—employee drug abuse—which, in the intervening years, has grown so enormously that it has begun to rival alcohol as a subject for deep concern.

The abuse of both alcohol and drugs has had a devastating impact on the careers of thousands of American workers. The economic cost in terms of lost output and medical expenditure is enormous—more than $100 billion annually, according to some estimates. And this occurs at a time when the American worker is in serious competition with highly motivated and productive work forces in other countries.

Alcoholism is by no means a new menace, but added to it in recent years has been drug abuse of epidemic proportions. A few items from the news may illustrate the dimensions of the problem:

- The National Institute on Drug Abuse found last year that fully one-third of Americans over the age of 12 have used marijuana, hallucinogens, cocaine, heroin, or psychotherapeutic drugs for nonmedical purposes at some time. Two decades ago less than 4 percent of the population had ever used an illegal drug.[2]
- Time Magazine, in a cover story last month, calculated that

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[1]Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 93.

[2]*U.S. Social Tolerance of Drugs Found on Rise,* The New York Times, March 21, 1983.

there are four to five million regular users of cocaine. A prominent prosecutor says that the drug is so pervasive among the middle class that there is little public support for enforcing the laws against its use.[3]

- New York City police have discovered that heroin is no longer a drug confined to the urban poor. Some sections of Manhattan have become interstate supermarkets for heroin—with cars from the suburbs and from surrounding states double-parked outside buildings where buys are being made. In New York State alone, there are an estimated 250,000 heroin users.
- Officials in Florida report that erratic driving by persons under the influence of tranquilizers and stimulants is beginning to pose as serious a problem as drunken driving.

This social groundswell has caused tremors in the work place. The users of drugs are the same people who go to work every day in our factories and offices. Unfortunately, we cannot merely round up the usual suspects; the drug problem extends from the toolroom to the boardroom, affecting managerial and professional employees as well as the mainstays of the shop floor. Just recently we have heard reports of an anesthesiologist who went into a drug-induced trance during a surgical procedure, of a U.S. Supreme Court Justice who suffered from impairment by prescription drugs, and of federal customs officials who ran an LSD-selling ring in the agency's headquarters.[4]

It seems safe to predict that arbitrators will be called upon increasingly to decide discipline and discharge cases involving abuse of drugs by employees. These cases are likely to pose a number of novel and perplexing issues. I would like to touch on a few of them today.

1. Should Drug Abuse Be Treated Differently Than Alcohol Abuse?

A primary question perhaps is whether it is inherently unfair or discriminatory for an employer to treat an employee involved

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[3]*Crashing on Cocaine,* Time Magazine, April 11, 1983; *Wide Cocaine Use by Middle Class Reported in New York Area,* The New York Times, December 13, 1983.

[4]*Anesthesiologist Loses Job on Drug Charge,* The New York Times, May 16, 1983; *Drug Rehnquist Used Carries Strict Warning,* The New York Times, January 7, 1982; U.S. Customs Service, 77 LA 1001 (Merrifield 1981).

with drugs more harshly than an employee involved with alcohol.

Although the notion of alcoholism as a treatable disorder has been gaining ground among industrial relations decision-makers, there seems to be much more resistance to the concept of rehabilitating an employee who is drug-dependent. Several reasons might be adduced to explain this resistance. To begin with, alcoholism is a much more familiar disorder than drug abuse, which became widespread only in recent decades. Secondly, some drugs, such as marijuana, have been associated primarily with the youngest members of the work force, while management and union leaders (and arbitrators) are generally more senior and perhaps therefore less sympathetic—although prescription drug abuse seems to be no respecter of age categories. Finally, some drug involvements carry a taint of criminality, leading industrial relations decision-makers to view the problem as one of law enforcement rather than therapy.

From a scientific standpoint, abuse of alcohol and abuse of other substances have much in common. One medical authority on drug abuse has stated that "Valium is essentially whiskey in a pill."[5] Moreover, the American Psychiatric Association has created an omnibus diagnostic category, entitled "Substance Use Disorders," which are defined as behavioral changes caused by alcohol, barbiturates, or cannabis (marijuana). Characterizing the disorders may be any or all of the following symptoms: "impairment in social or occupational functioning, . . . inability to control use of or to stop taking the substance, and the development of serious withdrawal symptoms after cessation of or reduction in substance use."[6]

Some researchers have placed alcohol well ahead of even heroin and LSD in the rankings of dangerous substances, and that view has received support from industrial relations specialists. There are corporate medical directors who believe that the standard governing drug use as well as alcohol use should be job performance. One has argued that "the question of whether the identification or diagnosis of drug abusers is synonymous with termination of employment must be answered with an emphatic

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[5]Andrew Weill, M.D., *The Perils of Pill-Popping*, The Manchester Guardian, October 21, 1979.

[6]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 3d ed. (Washington: American Psychiatric Association, 1980).

no. If the individual is doing his job, I do not believe that any company has the right to fire him."[7]

At least two arbitrators' opinions have expressed the belief that drug abusers and alcohol abusers must be treated substantially equally even when the employer prefers to distinguish between the two types of offenses. One has remarked, "I . . . cannot conclude that the use of alcohol on company property is less dangerous that the use of marijuana, or that referral to a drug abuse program is less effective than the referral to an alcohol abuse program."[8] Another has stated that the "use of [alcohol and drugs] has a similar debilitating effect on people" and that for the company to punish the drug abuser more heavily would mean that the company "has been inconsistent in the assessment of the hazards involved, and in turn the penalties applied."[9]

2. To What Extent Should the Legal Status of a Drug Affect the Outcome of an Arbitration?

It is universally recognized that a drug used by an employee can differ from alcohol in one highly significant respect: the drug may be illegal. In many arbitration cases, the grievant is involved with the so-called "street drugs," such as heroin, whose very possession is prohibited by federal and state laws. Or a grievant may be accused of using other federally controlled substances, such as ethical drugs which have bona fide medical applications but which were illegally obtained and administered without medical authorization—drugs such as amphetamines, anti-anxiety agents (tranquilizers) and barbiturates.

One issue before the arbitrator, then, is the extent to which the legal status of the abused substance should affect the outcome of the case. Arbitrators have differed, for example, about whether decriminalization detracts from the employer's ability to impose discipline upon an employee involved with marijuana. Here are two arbitral views:

> "The arbitrator is mindful that there is a growing tolerance of marijuana, and that there may be further decriminalization. But at this

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[7]John B. Cromie, M.D., quoted in T.S. Denenberg and R. V. Denenberg, Alcohol and Drugs: Issues in the Workplace (Washington: BNA Books, 1983), 19.
[8]*Hooker Chemical Co.*, 74 LA 1032, 1034 (A. Grant 1980).
[9]*Ethyl Corp.*, 74 LA 953, 157 (Hart 1980).

point the arbitrator cannot very well say the company did not have proper cause to discharge the grievant merely because it does not choose to adopt a permissive view of grievant's conduct."[10]

"The company's right to discharge for marijuana use is fully recognized. However, the arbitrator does find that the company has the responsibility to consider this factor, i.e., the decriminalization, as well as the employee's overall record and his length of service in determining the appropriateness of the penalty. . . . [T]his arbitrator must conclude that although the grievant clearly violated the company rule concerning use of marijuana, the company's summary discharge was not for just and sufficient cause."[11]

The decriminalization movement, if we can call it that, is not confined to marijuana. Some reputable voices are also urging that heroin be decriminalized. In its place they would put a form of the British system of registering heroin users, who are then provided with the drug by prescription. Would the legalization of heroin as a "treatment" make an employer less justified in discharging an employee who used heroin regularly?

We already face this issue in a somewhat different guise. Methadone is a drug which forms a part of legal, state-sponsored treatment programs. Yet it is also an addictive synthetic narcotic. Is an employer who has posted rules against drug use justified in discharging a worker whom it discovers to be a regular user of methadone? One of the distinguished past presidents of this body has ruled that the employer is not justified, although his ruling was predicated in part on the employee's holding what was considered a noncritical job; the grievant was a janitor.[12]

It should be borne in mind that perhaps the majority of seriously abused substances at this moment are medicines that are legally prescribed. A report last year by the federal government's General Accounting Office found that misuse of prescription drugs accounted for nearly three-quarters of the deaths attributed to drugs by medical examiners throughout the country.[13]

Medication is frequently misused by being taken in too large or too frequent doses or being combined with alcohol. This is

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[10] *Stansteel Corp.*, 69 LA 776, 779 (Kaufman 1977).
[11] *Montfort Packing Co.*, 66 LA 286, 297–98 (Goodman 1976).
[12] *Great Lakes Steel Corp.*, 57 LA 884 (Mittenthal 1971).
[13] *Abuse of Legal Drugs is Cited*, The New York Times, November 15, 1982.

particularly true of tranquilizers like Valium and Quaalude and a number of other psychoactive prescription drugs. (Employees may also be involved with a substance which is not technically a drug or medicine at all—as in the case of glue-sniffing.)

The workplace should, of course, be free of criminal activities, such as the distribution of illegal drugs. But the primary concern of industry is for safety and productivity. If these are jeopardized more by legal than by illegal substances, then employment rules that deal much more harshly with abusers of illegal drugs than abusers of prescription drugs may invite reexamination.

3. Identification of Drugs

Unlike cases concerning alcohol, arbitrations about drugs often center upon the nature of the chemical substance in question. While alcohol is readily identifiable, even by laymen, and its effects are generally recognizable, the presence of drugs—particularly the so-called "street drugs"—is not as easily verified. Consequently, many cases turn upon the identity of the substance the employee purportedly possessed, used, or sold. The need for scientific testimony in such cases has given rise to a new type of expert witness, the forensic psychopharmacologist.

Arbitrators have at times upheld a discharge for drug-intoxication even though the alleged drug was unknown. Substance abuse was inferred from the employee's behavior without ascertaining which substance was the cause. This reasoning process is perhaps understandable, because the possible range of abused substances is so large. (A recent listing of commonly abused drugs by the New York State Medical Society was extensive.[14]) Moreover, employees may engage in "polyabuse," the practice of abusing several substances simultaneously, and may become "cross-addicted" to both drugs and alcohol. (Such eclectic abusers are sometimes referred to as "chemical gourmets.")

However, arbitrators might to do well to consider whether, in some circumstances at least, the charge of abusing an unspecified substance may be so vague as to deny the grievant due process. It is difficult to rebut the charge of being under the influ-

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[14]Desk Reference on Drug Misuse and Abuse (Albany: N.Y. State Division of Substance Abuse Services, 1981).

ence of a substance when no substance is specified; the grievant does not have even the opportunity of pointing to discrepancies between the observed behavior and the known properties of a drug. To the extent that the charge is not open to refutation, it may be inherently unfair. Even so staunch an opponent of abuse as the U.S. Drug Enforcement Administration has warned that

> "the observable effects of drug abuse and overdose are often similar to the symptoms of illness. Such effects as watery or redrimmed eyes, dizziness, runny nose, and slurred speech may be symptoms of common ailments. Therefore, attribution of such symptoms to drug abuse must be done only on the advice of health professionals or where other independent corroboration can be obtained."[15]

No doubt the most accurate way of establishing that an employee is under the influence of drugs would be to perform a chemical test. However, unlike alcohol, for which there are standard breath and blood tests, reliable tests for many drugs are not yet available. There are laboratory procedures for detecting the presence in urine of tetrahydrocannabinol (THC), the ingredient which produces the effects associated with marijuana. But the test is too sensitive to furnish useful evidence. In some instances persons who merely sat in the same vehicle as a marijuana smoker showed traces of THC. Moreover, marijuana smoked as much as a week earlier may produce a positive test result. In a case in which an employee was alleged to have used marijuana at work or just before coming to work, such a test result would be inconclusive.

Another complicating factor is the absence of an accepted scale, comparable to Blood Alcohol Concentration (BAC), for measuring the effect of marijuana upon an individual. In a letter in the Journal of the American Medical Association earlier this year, a group of leading toxicologists cautioned: "It is impossible, at present, to establish by urine testing methods that the person [who smoked marijuana] was adversely affected by the drug. . . . [A] correlation between blood concentrations and possible impairment has not yet been fully established."[16]

Moreover, even that old evidentiary standby, the smell of marijuana smoke, may be in scientific jeopardy. Professor Ronald

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[15]Drugs of Abuse, 3d ed. (Washington: U.S. Department of Justice, 1979), 1.

[16]Arthur J. Bray et al., *Urine Testing for Marijuana Use,* 249 J. of the Amer. Med. Assn. 881 (February 18, 1983).

Siegel of UCLA, a prominent psychopharmacologist, has pointed out that there is little experimental evidence to prove that the average, untrained human nose can reliably detect the smell of marijuana.[17] Certainly the noses that have been accepted in evidence—primarily those of supervisors—have not been carefully calibrated.

Another source of confusion is "look-alike drugs"; a legal substance, such as caffeine, may be incorporated in high dosages in a pill that resembles in color and shape a standard brand amphetamine. Employees also have been reported to be abusing industrial chemicals found on the shop floor itself.

It has also been predicted that the already well-stocked "delicatessen of drugs," as one authority has called it,[18] will expand with the introduction of such natural exotics as African yohimbe bark (reputed to be a mild hallucinogenic) and artificially produced chemicals. The use of cocaine, it is believed, has created a ready market for a number of other substances whose mode of administration is nasal inhalation.[19] The advent of these new substances will make identification all the more difficult.

The inherent uncertainties in trying to attribute abnormal behavior to drugs suggests that it might be clearer and fairer for employers to discipline for "unfitness to work" or "impairment" rather than for behavior traced to drug use. Of course, the discipline then might not be summary in nature. A single instance of unfitness presumably merits a warning or suspension rather than a discharge. Still, by holding the employee responsible for repeated instances of unfitness according to the dictates of progressive discipline, the ultimate penalty could, in the end, be imposed upon chronic drug abusers.

4. Drugs and the High Security Workplace

The increasing incidence of drug use in industrial settings has evoked a strong reaction from some employers. They are turning to extraordinary security measures—hiring undercover agents to infiltrate the work force, introducing narcotics-sniffing

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[17] *Forensic Psychopharmacology: The Drug Abuse Expert in Court,* 1 Drug Abuse & Alcoholism Rev. 17 (September/December 1978).

[18] M. Duncan Stanton, M.D., quoted in *Drug Abuse in America: Widening Array Brings New Perils,* The New York Times, March 22, 1983.

[19] Ronald K. Siegel, *Street Drugs 1977: Changing Patterns of Recreational Use,* 1 Drug Abuse & Alcoholism Rev. 12 (January/February 1978).

dogs to check employees' personal property, and instituting surveillance of locker rooms.

Indeed, one management consultant—a former head of the Drug Enforcement Administration—has urged employers not to limit their vigilance to the plant premises. He suggests that employers maintain surveillance of nearby taverns and other places where employees gather when off duty.[20] Moreover, a survey of employers has elicited the information that some are screening employee medical insurance forms to ferret out potential abusers of prescription drugs.[21]

If carried far enough, obviously, this trend would result in what might be termed the "high security workplace." Such a workplace no doubt will provoke grievances which call upon an arbitrator to decide whether the employer's drug enforcement methods amount to an invasion of an employee's reasonable expectation of personal privacy.

The published cases reveal that arbitrators differ a good deal in the weight they accord to the testimony of undercover agents. Some arbitrators evidently view them as potential *agents provocateurs* who entrap employees into using or selling drugs. Other arbitrators are reluctant, as one has said, to reach a result which would mean "putting out of business . . . the members of a wholly respectable vocation who are much used to finding missing . . . heirs."[22]

In one drug case, the arbitrator was urged to discount the testimony of a security agent who had maintained a stakeout of the company parking lot; the agent was said to be unreliable because he was trying to improve his arrest record. The arbitrator decided that one might question the agent's motives, but he had difficulty believing that the narcotics dog who worked for the agent—and who had registered a scent—was also bucking for promotion.[23]

Arbitrators also differ in their willingness to uphold an employee right to freedom from unreasonable searches while at work. One arbitrator has declared in a substance abuse case that "there is no absolute right of employer to search personal ef-

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[20]Peter B. Bensinger, *Drugs in the Workplace*, 60 Harvard Bus. Rev. 48 (November-December 1982).

[21]*The Employee with Problems: Alcoholism, Drugs, Emotional Disturbance*, Policy Guide No. 431 (Washington: BNA, Inc., 1978).

[22]*American Air Filter Co.*, 64 LA 404, 408 (Hilpert 1975).

[23]*Baker Marine Corp.*, 77 LA 721, 724 (Marlatt 1981).

fects."[24] Another has asserted that the constitutional protections against unreasonable searches and seizures "do not shelter [an employee] from appropriate employer discipline."[25] Still others find a middle ground by drawing an analogy between the employer and a law enforcement officer. They hold that an employer has the authority to search for contraband substances—but only where the supervisor has "probable cause" to believe an "industrial felony" has been committed.[26]

One thing is clear: To the extent that employers heed the advice to expand surveillance, search, and screening measures, arbitrators will be called upon to help set the delicate balance between personal rights and the need for a workplace free of substance abuse.

5. Condoning Cocaine

Arbitrators also may be called upon soon to decide whether some employers have in fact condoned drug use by their employees. The arbiter is most likely to face the issue in a case involving cocaine, a substance that has been enjoying a vogue as the "caviar" of "recreational drugs."

In an oft-cited case decided more than 20 years ago, the arbitrator portrayed the grievant, who had been convicted on a relatively minor criminal charge involving cocaine, as a kind of crazed fiend who was a threat to the workplace. This judgment was made even though the grievant had a spotless 16-year work record and had never used the substance on the job.[27] Today, attitudes have changed considerably. Social scientists, the New York Times recently reported in a front-page story, "believe that the level of public tolerance of the use of illegal drugs is continuing to rise at all levels of society."[28] The use of cocaine is reportedly widespread in some industries; officials of the National Football League have gone so far as to declare the drug a threat to the integrity of the entire sport.[29]

Consequently, the following question might arise in a dis-

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[24]*Comco Metal Products Ltd.*, 58 LA 279, 281 (H. Brown 1972).
[25]*Isaacson Structural Co.*, 72 LA 1075, 1078 (Peck 1979).
[26]*Champion Spark Plug Co.*, 68 LA 702, 705 (Casselman 1977).
[27]*Chicago Pneumatic Tool Co.*, 38 LA 891 (C. Duff 1961).
[28]*U.S. Social Tolerance of Drugs Found on Rise*, The New York Times, March 21, 1983.
[29]*N.F.L. Says Players' Cocaine Use Could Threaten Integrity of Game*, The New York Times, June 26, 1982.

charge case: Did the employer in fact know that cocaine was being used widely by his employees, but turn a blind eye? The question is pertinent because cocaine, unlike most other drugs, is often taken with the intention of enhancing job performance. Some baseball players, for example, evidently believe that cocaine helps batters "see through pitches."[30]

Employers, in fact, have been known to supply cocaine to employees as an inducement and aid to hard work. The practice dates back to colonial times in South America when Spanish authorities furnished the drug to Indian miners laboring under arduous conditions. In our time there have been reports of employers' supplying cocaine to employees who were asked to work exceptionally long shifts.[31] A grievant in an industry where cocaine use is notorious might argue that the practice had been tolerated by employers, or even implicitly encouraged for the purpose of increasing employee output.

6. Conclusion: A Joint Approach to Substance Abuse

Reviewing the hundreds of alcohol and drug arbitrations that have been reported in the last three decades leads one inexorably to the conclusion that we need a joint management-labor approach to substance abuse—preferably through the collective bargaining agreement. Many disputes can be precluded by agreeing in advance on reasonable rules against substance abuse and a fair system for enforcing them. Moreover, management and labor have a good reason to offer rehabilitative options to those identified as drug-dependent persons as well as to alcoholics, through such mechanisms as Employee Assistance Programs. It is more sensible to intervene before severe disciplinary sanctions need to be imposed, thereby avoiding a protracted period of poor performance and perhaps coverups by fellow workers and supervisors. Given the mutual stake of management and labor in a safe and productive work environment, there is a strong common interest in reducing the scale and intensity of industrial conflict over substance abuse and, instead, making a mutual effort to eliminate it.

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[30]Neil Amdur, *Drugs and the Athlete: A Growing Threat,* Reader's Digest, (May 1978), 166.
[31]*Crashing on Cocaine, supra* note 3, at 23.