CHAPTER 8

DISCIPLINE AND DISCHARGE FOR OFF-DUTY MISCONDUCT: WHAT ARE THE ARBITRAL STANDARDS?

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I. Introduction

The issue of employee discipline or discharge for off-duty misconduct has received only passing attention during previous Annual Meetings of the Academy. Sanford Kadish, in 1964, raised the subject in a thoughtful examination of "The Criminal Law and Industrial Discipline As Sanctioning Systems: Some Comparative Observations." Kadish argued that the criminal law and employee discipline are "peas from the same pod." Each is a sanctioning system that employs the same kind of incentive: the use of punishment. Kadish also observed that each raises the issue of the individual's right to privacy, and he added these comments:

> In the criminal law there are two central issues—first, drawing the line between the kinds of conduct which the community may legitimately attempt to influence, and the kind which is strictly the individual's business, off bounds to the government; secondly, within the category of conduct in which the government has an interest, drawing the line between what may and may not be influenced through the particular sanction of punishment. In its broadest terms the criminal law typically faces one or both of these issues in attempting to define the acceptable relationship between crime and morals: Should nonconforming sexual conduct be punished even when it is

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engaged in privately and voluntarily by adults? How far may the state punish blasphemy, or obscenity, or drinking, or gambling, or dishonesty short of theft?

Kadish then drew a parallel to the private sector:

> The system of industrial punishment inevitably confronts the same general issue of distinguishing between what belongs to Caesar and what to the individual. The form it takes is in marking the boundaries of employer concern with employee misbehavior. May the employer discipline for fights outside the plant? What connections with the employer's business must exist to warrant this interference—that the quarrel arose from a plant dispute or that a supervisor was involved? Or even within the plant, when do demands for employee decorum in their own relationships, and in relationships with supervisors, trench upon their dignity as men? When an otherwise acceptable employee is arrested or perhaps convicted of crime unconnected with his work, but without effect upon his attendance, under what circumstances may the employer discharge? What of the efficient worker who is, or was at one time, identified with Communist activities? These are the problems on the industrial scene which raise the same conflict between the competing claims of conformity and individuality long faced by the criminal law.[1]

Professor Arthur Ross and Management Attorney John Hippel commented on Kadish's thought-provoking text. Ross observed:

> Mr. Kadish discusses the question of whether employees can be punished for misbehavior outside the job. Once again you will not find the answer by comparing the intrinsic culpability of different grievants. The celebrated infidelities of a movie star enormously increase her value as an employee; in fact the grateful studio even gives her husband $500,000 for being a good sport. But let us construct a hypothetical case of an instructor in a private girls' school operated by a devout religious group. He becomes involved in a juicy scandal and 25 percent of the girls are withdrawn by their parents. Have the employer's interests been sufficiently impaired that he is entitled to break off the employment relationship? I tried this out on my friend Jesse Friedin, a redoubtable champion of intellectual honesty. He accused me of being a mealy-mouthed hypocrite for espousing a double standard. But suppose that 50 percent or 75 percent of the pupils were withdrawn?[2]

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[1]Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in Labor Arbitration—Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 131.

[2]Ross, *Discussion, The Criminal Law and Industrial Discipline*, Id. at 150.

Management attorney J.E. Hippel posed the corollary question of whether the outcome in a criminal proceeding should have any effect in the arbitral forum and answered it as follows:

> Of particular interest to me was the [Kadish] analysis of the legitimate area of employer concern—what conduct can be punished? Naturally, if the offense is of the type that an arbitrator determines is none of the employer's concern, then discipline is wrong whether the man involved is guilty or innocent. But if the crime is a heinous one, I do not believe that the question of discharge should depend on the result of the criminal trial. Legal technicalities, the requirement of proof of guilt beyond a reasonable doubt, political pressures, if you will, all have an influence on the outcome of a criminal proceeding. These should have no place in arbitration. Let the offender be tried in each forum, under the rules and procedures of each, and completely independent of the other.[3]

Dean Harry Shulman, while Umpire for Ford Motor Co. and the United Auto Workers, considered this problem and concluded that "the jurisdictional line which limits the Company's power of discipline is a functional, not a physical line. It [management] has power to discipline for misconduct directly related to the employment."[4] But when is misconduct "directly related to employment," and what makes it so? Is an off-duty cocaine conviction related to employment? Shoplifting? Jury tampering? Statutory rape? What standards have arbitrators adopted when wrestling with cases involving off-duty misconduct? Sanford Kadish posed many significant questions but simply concluded that "[t]hey are the problems on the industrial scene which raise the same conflict between the competing claims of conformity and individuality long faced by the criminal law."[5] This paper seeks to provide an analysis of arbitral experience with off-duty misconduct issues and to suggest the appropriate benchmarks that appear to have evolved from this experience.

Some employers issue rules that make off-duty misconduct subject to discipline.[6] For example, American Airlines' Rule No.

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[3]*Id.* at 157–58.

[4]Opinion A-132, *Ford Motor Co. and UAW-CIO* (1944).

[5]Kadish, *supra* note 1, at 131.

[6]*See, e.g., Day & Zimmermann*, 84-1 ARB ¶8267 (Kanowitz, 1984) (rules providing for discharge for conviction of felony; discharge reversed for two employees convicted of marijuana possession where arbitrator finds discriminatory enforcement of rule); *Armstrong World Indus., Inc.*, 85–1 ARB ¶8004 at 3020 (Aronin, 1984) ("Acts involving infraction of the law, such as willful destruction or damage to property, violating common decency or morality, theft, misrepresentation or falsification of records, or taking part in any way in gambling activity, are also contrary to plant rules."); *University of Missouri-Kansas City*, 84–1 ARB ¶8036 at 3159 (Thornell, 1983) (sustaining discharge of university police officer for off-duty possession of "roaches" found in her purse, citing following rule: "The personal conduct at all times of any employees of the University shall be of such a nature as not to bring discredit upon the institution.").

34 provides, in part: "Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal." Of course, the reasonableness of such a rule and the merits of its specific application are subject to challenge before the arbitrator.

What standards have arbitrators articulated? In general, arbitrators are reluctant to sustain discipline or discharge based on off-duty misconduct (i.e., conduct that occurs off the premises during nonworking time) absent some relationship or "nexus" to the job. The reason for this principle was well expressed by Arbitrator Clair Duff twenty-five years ago in his often-cited *Chicago Pneumatic Tool Co.* decision.[7] There, Arbitrator Duff sustained the dismissal of a welder with 16 years' seniority who pleaded guilty to a narcotics offense: attempting twice to obtain cocaine by misrepresenting a physician's prescription obtained by another person. Duff found that the grievant had become addicted to cocaine, although he had never been shown to have reported for work under the influence. Duff warned that arbitrators should be reluctant to sustain discharges for off-duty conduct "lest Employers become censors of community morals," but he nevertheless agreed that "where socially reprehensible conduct and employment duties and risks are closely related, conviction for certain types of crimes may justify discharge."[8]

It is of note that Duff, quoting with approval the company's answer in the lower steps of the grievance procedure, recognized "reputation" and the morale of fellow employees as legitimate company considerations:

> The Company is not obligated to continue in its employ employees who commit offenses involving moral turpitude especially where a conviction is involved. To do so would be injurious to the reputation of the Company, in the Community and among its customers[,] and would have an adverse effect on employee morale.[9]

Duff also relied on the fact that grievant was not available for work, agreeing with the Company that it was "under no obligation to hold his job open for an indefinite period of one to twenty-four months, as is the length of his sentence."[10]

Likelise, in *Fairmont General Hospital*, Arbitrator Alfred Dybeck outlined the controlling principle as follows:

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[7]38 LA 891 (1961).
[8]*Id.* at 893.
[9]*Id.*
[10]*Id.*

> While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that an employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved.[11]

Arbitrator Harvey Nathan, in an unpublished decision (April 12, 1984), expressed the principle adopted by most arbitrators this way:

> [T]he generally accepted standard among arbitrators is that proof of off-duty misconduct, even when serious and/or criminal, does not justify automatic discharge. An employer must show that the conduct has a *demonstrable* effect on the employer's business. In this regard, saying it does not make it so. An employer must do more than simply make the pronouncement that it has or will be injured by retaining an employee who has engaged in off-duty misconduct. It is always possible that any employer could theoretically lose a customer, lose face with the public or suffer some general loss of business reputation by employing "convicts." An employer must demonstrate some meaningful nexus between the off-duty conduct and the employee's employment. [Emphasis in original.]

Arbitrator Nathan concluded that the employer, a large city, had been justified in its decision to discharge a firefighter who had pleaded guilty to felony-theft, given the characteristics of the firefighter's job:

> To begin with, there must be a recognition of the special nature of the work involved. Departmental employees are highly skilled personnel engaged in a variety of public health and safety functions. Their work is an integral and critical part of the functioning of the public body for which they serve. They are recipients of public trust. As such they have special duties and special rights. They are uniformed. They operate within a formal chain of command. They have access to private property under a variety of circumstances and may be called upon to assist police. Their conduct and appearance while on duty or off duty is specifically regulated. . . .
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> . . . [T]he particular crime involved, theft, or possession and sale of stolen property, renders the grievant particularly unsuited for fire fighting.

Our general review of the pertinent arbitration decisions indicates that the criteria considered by arbitrators in connection with the merits of discipline or discharge for off-duty miscon-

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[11]58 LA 1293, 1295 (1972).

duct belong in four categories: (a) damage to the employer's business or reputation or to both; (b) unavailability of the employee (incarceration); (c) impact of grievant's reinstatement on fellow employees (their refusal to work with the off-duty offender or their potential exposure to danger from the offender); and (d) unsuitability for continued employment in light of the misconduct. Many cases, of course, involve only one or two of these criteria. Moreover, as Hill and Sinicropi point out, such criteria often overlap in practice.[12] We will, in any event, conduct our examination of the cases on this basis in an effort to provide some coherence to the topic.[13]

We will also consider what actions employers may take on the basis of arrests and indictments but prior to court actions; whether guilty pleas are viewed as equal to convictions after trial; whether court-ordered probation may be a mitigating factor; and whether public sector criteria relating to off-duty misconduct differ significantly from those applied in the private sector. Finally, we will attempt to summarize our findings on this complex and wide-ranging subject.

II. Just Cause Criteria

A. Damage to Employer's Business

1. Actual or Potential Business Loss

Discharge or discipline for off-duty misconduct is very likely to be upheld when management can link the grievant's conduct to a significant loss of business. If the employee's conduct results in a jail term that causes a substantial production loss, or if the employer is compelled to cover for grievant's unavailability by paying costly overtime, the nexus between the conduct and the business is established.[14]

The employer must, of course, demonstrate "just cause" for the disciplinary action, and incarceration is not automatically a basis for discharge. For example, Arbitrator Edwin Teple rein-

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[12]Hill & Sinicropi, Management Rights: A Legal and Arbitral Analysis (Washington: BNA Books, 1986), 194.

[13]Many of the cases we review here are recent and/or unpublished, and we thank those members of the National Academy of Arbitrators who responded to our request for copies of pertinent unpublished decisions. A more complete listing of published decisions appears in Hill and Sinicropi, *supra*, Chapter 8.

[14]*See Bethlehem Steel Corp.*, 72 LA 210 (Sharnoff, 1979), where a discharge was held justified because of production loss caused by the employee's incarceration.

stated an employee who missed eight days of work because he had been jailed for operating a motor vehicle while his license was suspended. This was in spite of a contract provision calling for the termination of seniority rights when the employee is absent for three consecutive working days without permission. The company had stipulated that production was not affected.[15]

Discharge has sometimes been upheld where a business loss was only a possibility. A classic case concerned a bus operator who was identified as the acting grand dragon of the state branch of the Ku Klux Klan. Upholding his discharge, Arbitrator Clair Duff found that, unless this discharge was sustained, there existed a clear and present danger of physical violence and an inevitable boycott against the company.[16]

Arbitrator Marcia Greenbaum, in an unpublished decision (November 18, 1985), considered the case of a commission salesman for a small producer and distributor of phonograph records. The salesman had been discharged after Postal Service inspectors, equipped with a search warrant, found several cartfuls of pornography, including child pornography, in the salesman's home. The event received considerable local publicity on television and in the press. Inspection of the Postal affidavit by the company indicated that the salesman had been trading in child pornography, although no indictment had yet been issued against him. Arbitrator Greenbaum wrote:

> The question arises whether a person who has been accused of a crime, but not convicted, can be considered guilty of misconduct. In this case, the Grievant has not even been formally accused, as no arrest or indictment had occurred even eight months after the incident. At the outset, it should be noted that whether [grievant] is guilty of any violation of federal statute is not the issue before this Arbitrator, and no ruling is made on that matter. That is a question for the federal courts. What is before this Arbitrator is the question of whether or not there was just cause for the discharge of the grievant. . . .
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> The evidence establishes that there was sufficient public reaction to have removed [grievant] from his salesman's position . . . . Moreover, since the Grievant's work was entirely in sales, negative public perception not only affected the Company's reputation and business interests, but also his own ability to perform his job. If his main customer no longer wanted him servicing the account, the Grievant was unable to perform his job.

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[15]*Quick Mfg., Inc.*, 43 LA 54 (1964).
[16]*Baltimore Transit Co.*, 47 LA 62 (Duff, 1966).

Arbitrator Greenbaum concluded that the salesman's discharge had been for just cause. In so doing, she referred not only to the adverse reaction that had already taken place but also to probable future hazards for the company:

> [T]he next [flurry of information], if indictment and a trial with full disclosure ensued, might bring further reactions, including reprisals of no longer dealing with the Company, if it were known that [the Company] had continued to employ [the Grievant] after knowing what was contained in the affidavit. *A company should not be subjected to such a possible consequence, nor its employees risk the loss of work, because one of their number had continued amongst them under these circumstances.* . . . [Emphasis added.]

2. Injury to Company's Reputation

Damage to the reputation of the employer is a pertinent standard because it connotes a potential business loss. To determine whether an employee's conduct has injured the company's reputation presents a highly subjective issue, of course, in the absence of any objective measurement of actual harm. To the extent that the off-duty misconduct is reported in the press and the grievant is identified as an employee of the company, the case for discipline or discharge is strengthened, especially if the misconduct involved a serious crime. Also, regardless of the gravity of the off-duty conduct, arbitrators are more likely to find the required "nexus" when the grievant's position is one of high public visibility. Where certain felonies are committed, e.g., brutal crimes such as murder or sexual assault, it may not matter what position the grievant holds. The *potential* for adverse public opinion may be deemed sufficient to warrant a dismissal even without an objective showing that the company's reputation has been affected.

Arbitrators have often upheld discharge for the comission of off-duty felonies such as assault, drug possession, theft, firearm violations, and so on, concluding that the company's image and reputation would be negatively affected by an order of reinstatement. An unpublished decision by Arbitrator Donald Crane (February 27, 1985) concerned an employee who was arrested and charged with murder. While in jail, she sent a letter to her supervisor requesting a leave of absence or a vacation. Both requests were denied and she was discharged for an unexcused absence of more than three days. She had entered a plea of guilty to the lesser offense of manslaughter by the time that the case was heard in arbitration. Upholding the dismissal, Arbitrator

Crane considered (among other factors) the impact on her employer's reputation:

> In this case, we have no testimonial evidence that [the grievant] would damage the Company's image or create a potential danger to other employees. But none would be appropriate for it would only at best be an assumption or prediction. Until the Company had experiences with reinstated felons who committed crimes similar to [grievant's] there would be no way of demonstrating the results of their return to work. We have no such experience, but none is needed here. It is intuitively obvious that the Company's image would be tarnished by her reinstatement. C— is a small town and [grievant's] crime was headlined in the local press. Literally every citizen was aware of the incident and it would be naive to assume that the public would fail to associate her with the Company should she return to her job.

The arbitrator also expressed concern about potential risks, especially in light of the specifics of her crime:

> In addition, reinstating [grievant] would pose a potential liability for the Company. It is clear that she left the house of the victim and deliberately secured a lethal weapon at her home. She had time to contemplate her action; it was not impulsive nor in the heat of passion. Remote as it may appear, it is possible that her behavior could be repeated at work. Under the circumstances, employees could feel endangered. Even though one Union witness testified that he knew of no one who expressed concern about her reinstatement, there well may have been someone who feared her return. I do not want to be responsible for exposing employees to such a potential danger. . . .

One of the authors, Mark Kahn, in an unpublished decision (February 18, 1986), sustained the discharge of a female flight attendant based on her guilty plea to felony charges of lewd and lascivious acts with a 12-year-old boy who was living with his mother and brother in the grievant's home. The 36-year-old flight attendant was an employee with 17 years of service and a good work history. The record indicated that the grievant's arrest, indictment, conviction (on the basis of her guilty plea), her referral to the state medical facility, and sentencing were each reported in local newspapers, with the grievant identified by name and as an "airline stewardess" but with no mention of the name of her employer. Although finding that her return to duty would not place unaccompanied children at risk nor give rise to in-flight problems with co-workers, Kahn held that the critical factor for sustaining the dismissal was the effect of the grievant's conviction on the company's reputation. Kahn noted

that a flight attendant is among those job classifications with duties that involve substantial first-hand customer relations and, accordingly, the employer was entitled to greater concern about the adverse impact of unfavorable publicity relating to off-duty behavior. Kahn went on to explain the basis of his decision this way:

> I reach this conclusion [that just cause existed for the discharge] based on the gravity of this kind of misconduct as perceived by the traveling public; the fact that it involved the abuse of a youngster who was a boarder in grievant's home and who had been placed in grievant's care, for tutoring, by his mother; the fact that the misconduct was not a single thoughtless act but continued over a period of many [eight] months; the fact that the affair received substantial local newspaper publicity over a period of time, identifying grievant by name and as an "airline stewardess" although her employer was not named; because there is a high risk of additional publicity adverse to the Company that could be generated by her reinstatement; and because there also remains a risk, of unknown dimension, that such off-duty misconduct might reoccur: an event that could subject the Company to the probability of substantial adverse public notice compounded by grievant's previous identification as a felony sex offender. *The Company is not obligated, in my judgment, to assume such risks because of grievant's off-duty misconduct.* [Emphasis added.]

Another flight attendant removed a picture from its frame in her motel room while on layover, placed it in her suitcase, and took it with her from the motel. Her prior thirteen-year record was unblemished. Arbitrator Richard Bloch, in an unpublished decision (February 17, 1981), concluded that discharge was overly severe even though the airline was paying for the room and the motel had called the airline about its loss:

> [T]here is some justification in the Company's claim that it was involved in a sensitive situation. The Company responded with a letter of apology and restitution—about $55.00—for the picture. But while this was misconduct on the Grievant's part, it was neither so open, notorious or scandalous as to warrant the finding that the Company suffered in any real way. Even granting the difficulty of showing hard evidence as to adamaged reputation, one may not conclude that [grievant's] actions brought discredit to anyone but herself.
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> The Company may properly be concerned when the private actions of employees inevitably involve it in an unflattering light. At the same time, the Employer is neither the guardian nor the monitor of its employees' off-duty actions. Basic precepts of privacy require that, unless a demonstrable link may be established between off-duty activities and the employment relationship, the employee's private life, for better or for worse, remains his or her own.

Arbitrator Bloch reduced the penalty to a disciplinary suspension of sixty days.

B. Unavailability for Work

Many discharges are effected because an incarcerated employee is unavailable for work and being in jail does not provide an acceptable excuse. Such discharges are usually (but not always) upheld by arbitrators, who tend to reason that an employee who commits a crime, and thus causes the public authorities to place him in jail, should not complain about a condition he or she has created.[17] This principle was expressed, for example, by Arbitrator George Roumell in *McInerny Springs and Wire Co.*:

> [W]hen an employee is incarcerated, a company has the right to discharge him since he is, for that period of time, unable to work. The reason a discharge is proper in such cases is not because of the crime the employee has committed but rather it is simply that through the employee's own actions, he has made it impossible to fulfill his obligation to report to work. Therefore, in such cases, a company has "just cause" to terminate the employee since he is of no benefit to the company.[18]

In *Oxford Chemicals, Inc.*,[19] the grievant—a packer in a chemical company with 16 years of seniority—was convicted of involuntary manslaughter and, in March of 1981, sentenced to five years in a penitentiary. Grievant was released on bond, however, after filing a motion for a new trial, and returned to work. On June 16, 1983, the state filed a motion to dismiss grievant's

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[17]*See, e.g., Ralph-Pugh Co.*, 79 LA 6 (McKay, 1982); *Rock Island Ref. Corp.*, 84-1 ARB ¶8264 at 4183 (Schwartz, 1984) (employer justified in refusal to grant leave of absence for jail term, stating "the employee would have no 'right' to a leave of absence unless it could be shown that the Company denied a leave request for reasons that were wholly arbitrary or capricious."); *Louisville Gas & Elec. Co.*, 85-1 ARB ¶8018 (Feldman, 1984) (ruling that company may properly deny leave of absence to incarcerated employee); *Ohio Seamless Tube Div.*, 46 LA 947 (Dworkin, 1966) ("An absence resulting from a violation of law, and confinement in jail, does not serve to exonerate the employee from blame, or to release him from his obligation to report to work as scheduled."). *See also Westvaco, U.S., Envelope Div.*, 85-2 ARB ¶8445 at 4839 (1985), where Arbitrator Adolph Koven pointed out that "sentences of 30 days (*Sperry Rand Corp.*, 60 LA 220 (Murphy, 1973)), 60 days (*Oren Roanoke Corp.*, 70 LA 942 (Boyd, 1978)), two months (*Southwestern Ohio Steel Co.*, 1975 ARB ¶8391 (Dworkin, 1975)), ten weeks (*Firestone Tire & Rubber Co.*, 83-2 ARB ¶8462 (Van Pelt, 1983)), six months (*Ralphs-Pugh Co.*, 79 LA 6 (McKay, 1982)), one and one-half years (*Muncie Stone Co.*, 80-2 ARB ¶8443 (Cox, 1980)), and "an indefinite period" (*Bush Beryllium Co.*, 55 LA 709 (Dworkin, 1970)), have all been considered long enough sentences to justify termination."

[18]72 LA 1262, 1265 (1979).

[19]84-1 ARB ¶8277 (Holley, 1984).

motion and to revoke his bond. An order was then issued by the court for the grievant's arrest, and he was promptly incarcerated.

On July 18, 1983, the grievant spent a previously scheduled one-week vacation in jail. Unable to return to work on July 25, 1983, the grievant called his employer to explain the situation. The grievant told the company that he was being held by mistake and that his lawyer was trying to correct the matter. On July 27th, the grievant requested that he be allowed to use his three remaining weeks of vacation. His request was denied. The company, choosing not to accept the grievant's incarceration as an excuse, discharged the grievant on July 29, 1983, for four unexcused absences. (Under the company's rules, a total of four unexcused absences meant automatic discharge.)

The arbitration hearing took place on February 15, 1984. After the hearing, but prior to the award, the union's brief and a Motion to Reopen the Record was received by the arbitrator. The basis for the union's motion was that the grievant's conviction for involuntary manslaughter had been reversed on February 27, 1984. The company's brief was received in the afternoon mail. Ruling that the record is not officially closed until both briefs are received, the arbitrator decided to accept the information concerning grievant's successful appeal as part of the record. His award was that grievant should be reinstated.

The arbitrator, William Holley, used the approach of Arbitrator John Murphy in *Sperry Rand Corp.*, in which Murphy declared:

> Whether or not confinement of an employee in jail will authorize his employer to take some sort of disciplinary action depends upon all the circumstances, including, among other things:
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> a. The language of their contract.
> b. The length of confinement.
> c. The nature of the cause for confinement; i.e., whether as the result of an arrest and inability to post bond, or as a result of a sentence.
> d. The nature of the conduct resulting in confinement, i.e., its degree of seriousness and impropriety.
> e. The nature of the disciplinary action to be taken or which results.
> f. The employee's previous work and disciplinary record.
> g. The extent to which the absence affected the employer's production, etc.
> h. The effect upon plant morale.

i. Whether or not the conduct occurred on plant property or during working hours.[20]

Arbitrator Holley pointed out that although the contract allowed the company to discharge for four unexcused absences, "The nature of the cause for confinement did not adversely affect the Company" and "no evidence was introduced to show that the Company had been adversely affected." The arbitrator also observed that although the District Attorney was appealing the appellate court's reversal of grievant's conviction, the grievant at that time did not stand convicted of involuntary manslaughter. The award directed that grievant be reinstated effective on the date he could have returned to work following the reversal of his conviction. Grievant was not entitled to any back pay, however, for the period between his discharge and the date on which his conviction was reversed.

C. Impact of Reinstatement on Other Employees

1. Objections by Fellow Employees

To what extent do arbitrators consider the objections of the grievant's co-workers in off-duty misconduct cases? If, for example, the union produces statements from fellow employees that they have no objection to working with the grievant, should this evidence mitigate the employer's arguments that reinstatement of the grievant will cause ill feelings at the workplace? Our research suggests that arbitrators do consider the impact that reinstatement will have on the grievant's co-workers, although mere objections by fellow employees will rarely, if ever, be dispositive of the ultimate issue of just cause.

Arbitrator Elvis Stephens, in *Gulf Oil Co.*,[21] held that when a 31-year employee of an oil refinery had been indicted for indecency with a child (the grievant had sexual intercourse with a slightly retarded 12-year-old girl), the company's decision to terminate him was for just cause. Stephens found that there was a direct relationship between the off-duty conduct and the company's business. Specifically, the arbitrator pointed out that: (1) the company was the second largest employer in a small town where most of the residents either work for an oil company or

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[20]60 LA 220, 222 (1973).
[21]85-1 ARB ¶8234 (1984).

for a business that works for an oil company; (2) company representatives spoke to neighbors of the grievant, who were all appalled by the crime and wanted the grievant to move away; (3) fellow employees expressed shock and indicated a reluctance to work with the grievant; (4) several fathers had threatened to injure the grievant; (5) the grievant admitted receiving threatening and obscene letters and phone calls; he began to carry a camera in order to photograph individuals who would stop and abuse him; (6) the father of the girl, who used to work at the refinery for many years and still has friends there, owns a company that services the refinery on a continuing basis; the mother testified that they moved to a different community at the child's request; (7) some members of the grievant's church quit the congregation; and (8) the union acknowledged that five union stewards, in two days, could find only 43 out of 2,100 members who would sign a statement that they had no objection to working with the grievant.

Arbitrator Samuel S. Kates, in a case involving a morals conviction, ordered conditional reinstatement of the discharged grievant. The employer was authorized to discharge the grievant in the event that his reinstatement, despite the conviction, caused adverse reactions either within the plant or outside.[22]

2. Potential Danger to Co-Employees

Another appropriate basis for discharge may be the risk to the enterprise and its employees of similar future misconduct by the grievant on the job. Arbitrator Eva Robins, in an unpublished decision (April 17, 1984), considered the case of a flight attendant who was charged with second degree murder for allegedly setting fire to a house he owned jointly with his wife. His sister had been killed because of the fire. The grievant pleaded guilty to a reduced charge of voluntary manslaughter and was sentenced to six years of detention suspended under prescribed conditions of probation. These conditions included a ban on narcotic drugs and alcohol consumption and submission to alcoholism treatment. There was no claim of adverse publicity or other harm suffered by the employer. Because the grievant had not stopped drinking, and there was evidence of "angry incidents and uncontrolled temper," Arbitrator Robins concluded that it would not be prudent to return the grievant to his job. In

[22]*Armco Steel Corp.*, 43 LA 977 (1964).

her words: "The risks involved are simply too great." Arbitrator Crane acted on a similar concern (see above page 129) where he "did not want to be responsible for exposing employees to such a potential danger. . . ."

In *Union Oil Co. of California, Beaumont Refinery*,[23] the grievant, a pipefitter apprentice, had been arrested while on sick leave and charged with the delivery of cocaine. On June 18, 1984, she received a ten-year unadjudicated probation for possession of prohibited drugs. The probation was to be removed from her record if successfully served. After the grievant returned to work, the local newspaper erroneously reported the grievant's probation as a conviction for the delivery of cocaine. This publicity prompted the company to conduct an investigation that revealed the circumstances leading to her arrest, and on July 5, 1984, the grievant was dismissed.

Sustaining the grievance, Arbitrator Samuel Nicholas asserted that in order to extend the application of management's rights outside of the workplace, there must be a nexus between the employee's conduct and the company's operations. He found the company's justification for discharge—that the grievant was a safety risk and that the company had an obligation to prevent the spread of narcotics abuse among its employees—problematic because the company's focus was on the employee's future conduct as opposed to her past misconduct. Citing Judge Learned Hand, the arbitrator stated that the risk to the company can be expressed in the following equation: "Total risk equals the probability of the occurrence of the hazard weighed with the severity of the hazard." One point in the grievant's favor, said the arbitrator, is the fact that she received an unadjudicated probation with heavy penalties facing her should she again become involved in a narcotics offense. The arbitrator also concluded that the grievant's reinstatement would not increase the chance of other employees being exposed to drugs.

D. Unsuitability for Continued Employment

What makes an employee unsuitable for continued employment? Mere lack of trust by the employer? When does conviction of a crime, for example, impair the employee's usefulness to the employer? May an employer's usefulness be impaired even

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[23]85-1 ARB ¶8161 (Nicholas, 1985).

though there is no media publicity of the off-duty misconduct? A major consideration, of course, is always the employee's specific job and how the misconduct at issue affects his job responsibility. In many of the decisions examined by the authors, management has contended that a security guard's duties require a higher standard of off-duty conduct than other employees because of the employer's interest in maintaining public respect for its guards. May the same argument be made regarding job classifications other than the protective services?

Arbitrator Jonathan Liebowitz, in an unpublished case (February 24, 1986) involving the off-duty misconduct of a nurse, quoted with approval the following discussion by Arbitrator Tia Denenberg (also unpublished):

> [The right of an employer to discipline an employee for off-duty misconduct] is indeed recognized by "arbitral common law," even when the off-duty employee is away from the employer's premises. But it is a narrow exception to the rule that off-duty conduct is beyond the disciplinary powers of the employer. Discipline for off-duty conduct is typically upheld only where the employee's actions amount to such a grave offense that they inpugn the employee's competence or integrity, or bring community opprobrium upon the employer. . . . The off-duty misconduct must be so serious that there is a palpable nexus to the employment relationship: the misconduct must give ample grounds for doubting the employee's ability to perform satisfactorily while on duty.
>
> Certainly, if an off-duty nurse commits an act which gives the employer reason to doubt her trustworthiness in caring for the sick, the employer might feel compelled to discharge her. A nurse who abuses a patient, for example, while serving as an independent contractor could be deemed unfit to continue her regular employment regardless of where or when the abuse occurred.
>
> No discipline is warranted, however, for off-duty misconduct which does not impugn the intrinsic competence or character of the employee.

Arbitrator Liebowitz applied the above principle in a case where a supervisor of nurses secured a pacifier in the mouth of a 28-day-old infant with adhesive tape. The union argued that the grievant's regular employer lacked jurisdiction to impose discipline because the grievant was not working directly for that employer at the time the infraction occurred but for an independent contractor, although on her regular employer's premises. In finding that there was a "palpable nexus to the employment relationship," the arbitrator held that the infraction does "impugn the employee's competence." In his words,

"It is hard to picture a closer nexus than is present in this case; all that is lacking is employment by the Corporation itself."

Arbitrator Jason Berkman, in an unpublished decision (December 9, 1982), considered an airline's dismissal of two station agents upon discovering they had entered a guilty plea to a charge of grand theft of property from a local Burdine's warehouse store. The arbitrator observed:

> Certainly one of the considerations always must be the employee's job responsibility, and how the employee's outside conduct relates to his responsibility. For example, there would be little question in the arbitrator's mind that if these two grievants had pled guilty to a petty morals charge or a misdemeanor charge of assault and battery off the Company's premises, coupled with a lack of publicity that they are Company employees, there would be no basis for the extreme penalty of discharge. . . .
>
> The Grievants also dealt in a general sense with valuable property belonging to the Company's customers, and with cash. The Company had the right to expect unimpeachable integrity and honesty from its employees handling valuable property and large amounts of money.

Arbitrator Berkman concluded that "the Grievants' admitted acts of dishonesty bears a substantial relationship to their job duties"; thus, the company had just cause for terminating their employment.

The same result was not reached by Arbitrator Benjamin Aaron in an unpublished decision (May 3, 1971) involving the dismissal of a flight attendant for failing to respond truthfully to questions by company investigators regarding the off-duty use and possession of marijuana in her apartment. Arbitrator Aaron did note, however, that the carrier would have had sufficient grounds for disciplinary action "upon proof that the accused were smoking marijuana immediately prior to flights or during layovers, or that they were transporting marijuana on the Company's aircraft." Absent this nexus, he wrote:

> What its employees do on their own time is not the Company's business. It has no right to interfere or even to inquire about such leisure-time activities. And if the Company has no right to pry into its stewardesses' private affairs, it surely has no right to discipline them for refusing to answer improper questions truthfully.

Arbitrator Richard Mittenthal considered the "suitability" standard in an unpublished case (May 4, 1983) where a security officer working for a major auto manufacturer was discharged upon his arraignment for drug trafficking. The company had

two of its officers at the preliminary examination, where a judge found that the evidence was sufficient to arraign the grievant on two felony counts: possession of cocaine and marijuana "with intent to deliver." The grievant eventually pled guilty to a reduced charge, namely, attempted possession of less than fifty grams of cocaine. Arbitrator Mittenthal quoted at length from an early General Motors-UAW Umpire decision (C-278) by Ralph Seward in which Seward eloquently and cogently said:

> [I]t should be emphasized that the mere fact that an event takes place off the Plant premises and outside of working hours does not necessarily deprive Management of all disciplinary authority to deal with it. Previous decisions of this Office have already established that events outside of a Plant which have a demonstrable injurious effect upon employer-employee relationships within the Plant may rightly be the subject of disciplinary action. It is true, of course, that the right of the Corporation to discharge or discipline for cause stems from its position and function *as an employer* and thus ordinarily extends only over actions of its employees which take place on Plant property during working hours or in the course of their employment. There are no hard and fast geographic and temporal limitations, however, upon the employer-employee relationship. It is not terminated when an employee's shift ends and he leaves the Plant. Even while sitting with his family at home he is still on the payroll and still maintains with the Corporation a series of mutual rights and obligations *which no one not* an employee possesses. The reason why the Corporation, under the Agreement, may not usually penalize him for his actions away from the Plant and on his own time is not because the Corporation is no longer his employer but because ordinarily such actions do not have a sufficiently direct effect upon the efficient performance of Plant operations to be reasonably considered good cause for discipline.
>
> The initial judgment as to whether or not an incident occurring off its property sufficiently affects Plant operation to justify discipline must obviously be made by the Corporation. Before the Umpire, however, such judgments are not entitled to the same presumption in favor as supports its judgments concerning events within the Plant and the necessity for particular Shop Rules. Employee morale may be affected to a greater or lesser degree by all sorts of events in the surrounding community—by the private quarrels of employees, their love affairs, their illnesses, their debts, their minor or major infractions of law, their marriages, and the smooth or stormy course of their family lives. Yet the mere fact that such events have repercussions within a Plant gives Management no general right to act as guardian of its employees' morals or supervisor of their private conduct. Only in exceptional cases, where the impact upon Plant operations is shown to be clear, serious and direct, may Management intervene. And in each contested case Management must satisfy the Umpire of the reasonableness of its

judgment—must show that the effect of the incident upon working relationships within the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority.

The company argued that the grievant—a long-term employee with a spotless record—was no longer suitable for employment because he held a "position of trust" with respect to the enforcement of shop rules, plant regulations, and inspection of vehicles and packages. According to the company, the drug-trafficking conviction would render him ineffective in the security area because it could no longer rely on the "honesty, integrity, and trustworthiness" of the grievant as a security guard. Noting the absence of any indication that the grievant ever brought drugs into the plant or sold drugs to employees within or outside the plant, Arbitrator Mittenthal concluded that no hard evidence demonstrated that the grievant's off-duty conduct affected in any way his performance as a security officer. In the arbitrator's view:

> The root problem here is the Company's loss of trust in [grievant]. If that were the controlling test, then the Company could discharge any Security Officer whom it no longer trusted because of the commission of an off duty crime. Such a subjective test is inappropriate. The issue must be, as stated by Umpire Seward, whether the off duty misconduct has "a sufficient direct effect upon the efficient performance of Plant operations to be reasonably considered good cause for discipline." Again, to use Seward's words, the Company "must show that the effect of the incident upon working relationships in the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority." I find that the Company has not made such a showing.

The arbitrator accordingly reinstated the grievant with full seniority and back pay.

III. Cognate Topics

A. Employer Actions Prior to Trial

What do the cases indicate employers do when they learn about (a) an arrest and/or (b) an indictment for the kind of off-duty offense that they believe would justify discharge if established? When is a pretrial suspension or discharge justified if the employer has no independent evidence of guilt? If the employer suspends without pay and the employee is acquitted, is the employer ever obligated to make the employee whole? If the em-

ployer permits the employee to work for, say, several months, pending the verdict, and the employee's work record remains a good one, does this not weaken the basis for the discharge if the employee is found guilty? And what effect do or should appeals have? Sometimes there are pertinent contract provisions or published employer policies in this area. The collective bargaining agreements with the United States Postal Service, for example, provide for indefinite suspension when the employer "has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed."[24] Our review of the cases indicates, however, that there are no easy answers to these questions. Here are some cases that illustrate the complexities in such situations.

Arbitrator Paul E. Glendon, in an unpublished decision (November 6, 1981), referred to a precedent case involving the same parties:

> Both parties cite the award of Arbitrator Maurice O. Graff. . . . In that case, an employee . . . was discharged after incarceration on charges of "attempted murder and four counts of aggravated battery resulting from an altercation in his family." The Company discharged the employee before his guilt had been determined. Emphasizing the employee's long seniority (more than 13 years), and noting that "involuntary termination of one's employment . . . may well be more damaging to his future than a criminal conviction," the arbitrator found his discharge "was unnecessarily hasty and unjustifiably harsh."
>
> Arbitrator Graff suggested the Company might better have given favorable consideration to the employee's request for leave until the criminal proceedings were completed. He reinstated the employee without back pay, and held the "time between his discharge . . . and the eventual date of his return to the job, if such occurs, shall be regarded as a period of suspension from employment, pending the outcome of the legal proceedings now in progress and evaluation at that time of his potential for continued effective citizenship, productivity and acceptance within the [Company's] employee community." The arbitrator gave no indication how these rather large, ambiguous questions of "citizenship, productivity and acceptance" were to be determined, nor what their contractual basis might be.

In the subsequent case before Arbitrator Glendon, a heat treat operator with less than one year of service was imprisoned in April 1980 for shooting his estranged wife at her place of employment. Unable to post bail, he remained in prison for

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[24]We thank Arbitrator John W. McConnell for calling this to our attention.

almost nine months. After he was "AWOL" for more than three days, the company suspended him indefinitely pending the outcome of the charges. In November 1980, while in jail, this grievant pleaded guilty to attempted homicide. The company then discharged him on the basis of "the decision of the court regarding the charges against you and your inability to report for work." The story does not end here.

The grievant, in January 1981, withdrew his guilty plea and asked for a jury trial. One week later, on reduced bail, he was released from prison. In March 1981 he was convicted of attempted voluntary manslaughter but then sought a new trial on the ground that no such offense appeared in the statutes. This was denied and he was scheduled to be sentenced in December 1981. The arbitration hearing took place in October 1981 on the issue of whether grievant's discharge (in November 1980) had been for just cause. Arbitrator Glendon wrote:

> The central facts are these. Grievant did shoot his wife. Whatever the courts ultimately make of that, it cannot be denied that grievant's prolonged absence from work was a direct result of his own actions. Such prolonged absence, without excuse or approval by the Company, obviously affects the employment relationship. There is no contractual mandate for the Company to approve such an absence, although it saw fit to withhold judgment both to comply with the Graff award and for humanitarian reasons (in that grievant's family remained eligible for certain benefits attendant upon his employment while he was indefinitely suspended).

The grievance was denied, it being found that discharge based on grievant's guilty plea was for just cause.

Arbitrator Marvin Feldman, in *Louisville Gas & Electric Co.*,[25] ruled proper the indefinite suspension of a utility worker after he was charged with a murder that was not connected with his employment. This grievant was also advised that "the Company does not consider incarceration as a legitimate reason for requesting a personal leave of absence." He was later convicted of manslaughter II and then terminated, but the arbitration concerned only the validity of the indefinite suspension prior to conviction. Arbitrator Feldman wrote:

> While conviction may trigger a sentence under statute, an allegation and arrest for a serious crime may well trigger immediate discipline under a collective bargaining agreement situation. If that were not

[25]85-1 ARB ¶8018 (1984).

> so, then in that event the Company would be unable to maintain safety for its employees for which it is charged. The management's rights clause states that the Company may relieve employees for just cause. Such an occurrence as happened in this matter is such cause at time of arrest.[26]

In an unpublished decision by Arbitrator Mark Kahn (December 2, 1983), a flight attendant with five years of service was suspended on November 9, 1981, pending the outcome of a trial (scheduled for January 25, 1982) for the sale of cocaine to an undercover police officer. In January 1982, prior to that trial, the company learned that grievant had pled guilty on April 13, 1978, to the offense of "sale of marijuana" and had been sentenced to a jail term of two-and-one-half years. Execution of this sentence was stayed, however, in favor of a comparable period of probation and a fine of $1,500. Grievant had lost no work time because of these events and the company was not aware, until January 1982, that they had occurred. The company decided to discharge grievant on January 21, 1982, on the basis of that 1978 marijuana conviction.

Two grievances were filed, one challenging the January 1982 dismissal based on the 1978 conviction, and one alleging that the November 1981 suspension, based solely on the indictment, was improper. As to the former, Arbitrator Kahn found "that the substantial passage of time involved, during which grievant's job performance was satisfactory and the Company suffered no detriment of any kind because of the 1978 conviction, would militate against the termination of grievant's employment in January 1982." Kahn pointed out that the grievant had functioned satisfactorily as a flight attendant before and after the marijuana conviction and concluded, "[t]here is no evidence of any kind of nexus between grievant's illegal conduct in 1978 and his employment as a Flight Attendant."

The arbitrator also ruled, however, that it was permissible for the company to remove the grievant from flight status in November of 1981 pending the outcome of his cocaine trial. The allegations were found to be serious, and, in the words of Kahn, "[s]uch allegations provided a reasonable basis for a Company decision that grievant should not be on duty until the criminal charges against him were decided by a court."

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[26]*Id.* at 3081

B. Guilty Pleas Versus Convictions After Trial

Should a guilty plea have preclusive effect in a subsequent arbitration even though the issue of guilt had never been litigated? Is a guilty plea more than an ordinary admission? Professor Allen Vestal has argued that in a subsequent civil action a plea of guilty, at least in a serious crime, should normally be preclusive against the person who entered the plea, unless that person could show that, when the plea was entered, there was no opportunity or incentive to litigate the matter.[27] Black letter law on the matter provides that preclusion applies only when the issue is "actually litigated and determined by a final and valid judgment."[28] Those who argue that a guilty plea should not have preclusive effect point out that there is a difference between a conviction following an adversary trial and a plea of guilty. Others have submitted that a guilty plea should carry more weight than a conviction because it constitutes a solemn admission of the elements of the crime in open court and the Constitution requires that a guilty plea may not be accepted unless the court determines that the plea is made voluntarily. Moreover, many jurisdictions require an independent factual basis for all guilty pleas. Still, guilty pleas are often the product of plea bargains and their reliability can be subject to question.[29]

Our review of the decisions suggests that arbitrators have been reluctant to consider going behind a guilty plea. For example, Arbitrator John F. Sembower wrote:

> Although the grievant testified that he pleaded guilty only upon advice of an attorney that it would be the easiest way out of a not-too-serious charge and the way to obtain a suspended sentence, it is not possible to go behind such a plea. Unfortunately quite a few defendants appear to be counselled thus, and as a consequence have seriously blemished records, for in 14 American Jurisprudence 952, Criminal Law, 272 "Force and Effect of Plea," it is bluntly stated:
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> > A plea of guilty accepted and entered by the court is a conviction of the highest order. . . .[30]

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[27]*The Restatement (Second) of Judgments: A Modest Dissent,* 66 Cornell L. Rev. 464, 471, 478–83 (1981).

[28]Restatement (Second) of Judgments, §27 (1982).

[29]*See, e.g., Means Servs., Inc.*, 81 LA 1213, 1216 (Slade, 1983), where the arbitrator, in reinstating an employee for an off-duty theft, concluded that the grievant's guilty plea may have been the result of a plea bargain.

[30]*Northwest Airlines & Transport Workers Union*, 69–2 ARB ¶8867 (1969), at 5944.

It does not appear to be disputed that a guilty (or nolo contendere) plea should be admitted by the arbitrator as valid evidence against the grievant. It is, after all, an admission against interest and should be accorded whatever weight is justified.[31] The authors believe, however, that the arbitrator should also accept evidence pertaining to the circumstances surrounding that plea. There can be a difference between legal guilt and guilt in fact. An individual may not be guilty of the precise crime to which she or he has pleaded but, in fact, of a lesser or greater crime. Arbitrator David Feller has stated that, when admitting into evidence a nolo or a guilty plea, he would recognize that "many times people plead guilty in a plea bargain when they really think they are innocent" and that he would therefore "allow the grievant to explain her plea if she wanted to."[32] We concur.

C. Probation and Work Release Programs

Does an employer have an obligation to cooperate with a prison work release program or with a probation officer who is anxious to have the grievant gainfully employed? An affirmative view was expressed by Arbitrator Florian Bartosic in an unpublished decision (April 9, 1982): "There is substantial authority for the proposition that a grant of probation by a court 'represents a determination that Grievant is a safe and useful member of society with the assistance of the probation department.' "[33] Accordingly, in reinstating a flight attendant who had pleaded guilty to conspiracy to commit second-degree forgery involving the use of stolen credit cards, the arbitrator focused on the treatment of the grievant by the court:

> Here, the Court granted the Grievant's request to participate in a work release program to serve his 30-day confinement [which grievant was unable to do because of his prior discharge] and placed him on probation for the remainder of his sentence. Thus, not only did the Court conclude that the Grievant was a safe and useful member of society; the Court concluded that the Grievant was particularly safe and useful to the Company. This determination was presumably based upon a comprehensive investigation conducted by the

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[31]*See, e.g., Department of the Air Force*, 74 LA 949 (Ward, 1980).

[32]Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983), at 119.

[33]Citing *Linde Co.*, 37 LA 1040, 1043 (Wyckoff, 1962).

> probation department, which recommended Grievant for the work release program. Under these circumstances, to sustain the Company's decision to discharge Grievant would, in effect, be at odds with the court's decision. Like the Court, the Board of Adjustment is of the view that the Grievant is capable of making a valuable contribution to the Company.

Of particular interest was the arbitrator's reasoning in regard to the question of back pay. He wrote:

> For the Board to order reinstatement yet deny back pay would require the Board to assume logically incompatible positions, namely, (1) absent a connection between an employee's off-duty misconduct and the employment relationship, no discipline may be imposed and (2) despite the fact that no such connection exists, the misconduct nonetheless warrants discipline.

Arbitrator Bartosic, accordingly, concluded that the grievant should be reinstated and made whole for "all wages and benefits that he would have received but for the discharge."[34]

Arbitrator John C. Shearer reinstated the young employee of a chemical plant who had been discharged in connection with a guilty plea to the misdemeanor of marijuana possession. His offense had been off-duty and did not involve other employees. This grievant had been fined $500 and sentenced to two years on probation with the understanding that if he met the terms of the probation the conviction would be expunged from his record. The Arbitrator commented:

> It was clearly the intention of the court *not* to brand Grievant as a convicted criminal if he successfully met the terms and conditions of his probation and paid the $500 fine. The court thereby clearly sought to protect society while at the same time protecting Grievant against the stigma and its consequences, such as reduced employment opportunities, which often accompany criminal conviction. Although the manner in which a court may handle a case does not necessarily determine what an employer may do in disciplining an employee for the same offense, in the present set of circumstances the Company's considerable emphasis on the "criminal conviction" as the main reason for the discharge is largely invalidated by the court's decision. . . .[35]

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[34]There are, of course, situations where back pay may not be appropriate. Back pay has been denied because the employee did not accept or recognize guilt. *See, e.g., American Airlines*, 68 LA 1245, 1248 (Harkless, 1977) (denying back pay "in order to impress upon her the seriousness of her off-duty misconduct [shoplifting]"). Back pay in whole or part may also be denied in probationary situations where the arbitrator concludes that the misconduct was sufficiently job-related to warrant some discipline although just cause for discharge did not exist.

[35]*Vulcan Materials Co.*, 56 LA 469, 473 (1971).

As noted above, Arbitrator Samuel Nicholas regarded the fact that the grievant had been sentenced to an unadjudicated probation, during which she faced heavy penalties for another narcotics offense, as "one point which runs in Grievant's favor."[36]

The fact that an employee is placed on supervised probation, even with no jail sentence at all, does not necessarily establish that a discharge was improper. It is clear, however, that probational status, including an opportunity granted by the court to participate in a work release program, merits consideration by the arbitrator as an element in determining whether just cause did exist.

D. Is the Public Sector Different?

Most of the arbitration cases we have cited and discussed today happen to have come from the private sector. Are public employees subject to different standards in regard to off-duty misconduct? We believe, as a reasonable generalization, that they are not.

If you have the impression, somehow, that the constraints on public employee off-duty behavior are relatively strict, we suggest that this impression may be based on the fact that a larger proportion of public-sector jobs have characteristics that cause their public employers to be highly concerned about the consequences of off-duty misconduct. To illustrate: We have no reason to believe that different criteria govern teachers in public schools and police officers than apply, respectively, to teachers in private schools and to private security guards; but there are a lot more teachers and police officers in the public sector than their private-sector equivalents. A rigorous study by Professor Michael Marmo concluded:

> Generally, arbitrators do not believe that, as a group, public employees should be held accountable to higher standards of off-duty behavior than their private sector counterparts. Thus, truck drivers for municipalities are not expected to be any more circumspect in their off-duty activities than their private sector counterparts. It is unquestionably the case, however, that public employees in particularly sensitive jobs, and those whose misdeeds are most subject to adverse publicity, such as teachers, police officers, and firefighters, are held to higher standards than most other private or public employees.[37]

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[36]*Union Oil Co.*, 85–1 ARB ¶8161, at 3674.

[37]*Public Employees: On-the-Job Discipline for Off-the-Job Behavior*, 40:2 Arb. J. 23 (1985).

Another analysis of discipline for off-duty misconduct, covering both public and private sector employees, found that "public sector arbitrators examine off-duty misconduct charges in a fashion similar to private sector arbitrators."[38] In the view of Hill and Sinicropi, however, "there appears to be a greater sensitivity [in public sector off-duty cases] to the criteria of the reputation and mission of the agency on the part of both arbitrators and courts."[39]

Some issues, it should be noted, are peculiar to the public sector. In particular, we should mention off-duty political activity and whistleblowing (going public) with matters relating to the internal operations of the public employer.[40] Each of these issues may present, for the arbitrator, the difficult task of balancing the rights of the grievant as a citizen with his or her obligations as an employee.

Public employees have been more successful than their private sector counterparts in claims—usually, in their appeals of arbitration decisions to the courts—that their constitutional rights were violated when they were disciplined for off-duty misconduct.[41] Hill and Sinicropi concluded:

> If the employee's [off-duty] conduct involves a fundamental right such as speech or is within an individual's recognized "zone of privacy" such as heterosexual intercourse, a public employer will have to show more than a *de minimis* interest before it can justify a discharge for engaging in protected conduct. At times, the employer's interest must be "compelling," depending upon the particular occupation at issue and the degree of infringement on the protected conduct. Finally, if a court finds that the employee has a property interest in continued employment, or that the discharge affects a "liberty" interest, certain procedural guarantees must be accorded the individual.[42]

Federal Sector.[43] Our treatment of off-duty misconduct would be incomplete without some reference to the federal sector. By way of background, most federal employees who are suspended

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[38]Marvin Hill, Jr. and Donald Dawson, *Discharge for Off-Duty Misconduct in the Private and Public Sectors,* 40:2 Arb. J. 35 (1985).

[39]Hill and Sinicropi, *supra* note 12, at 209.

[40]See Marmo, *supra* note 37, at 11–14, for a thorough examination of these topics.

[41]A substantial examination of this topic appears in Hill and Sinicropi, *supra* note 12, at 219–234.

[42]*Id.* at 234.

[43]A special note of thanks to Gerald Eggemeyer, Esq., of Minahan & Shapiro, P.C., Denver, Colorado, who provided an exhaustive memorandum on the subject to the authors.

for 14 days or more or who are terminated (an "adverse action") may appeal the action to the Merit Systems Protection Board (MSPB).[44] In general, an agency may take an adverse action against an employee "only for such cause as will promote the efficiency of the service."[45] The Board must sustain the agency's decision if it is supported by appropriate evidence.[46] If the employee is a member of a collective bargaining unit, he or she, in the alternative, may challenge the disciplinary action by pursuing any grievance and arbitration procedure provided by the collective bargaining agreement.[47] When deciding an appeal over an adverse action, federal law provides that an arbitrator shall be governed by the burdens of proof set forth in 5 U.S.C. section 7701(c)(1). This section requires that the agency shoulder the burden of showing that an adverse action is justified by the "preponderenace of the evidence."

A review of federal cases indicates that, in adverse actions for off-duty misconduct, the agency must show that: (1) the alleged misconduct did, in fact, occur; (2) there is a nexus, or connection, between the misconduct and the employee's work performance or the mission of the agency; and (3) the disciplinary penalty is reasonable.[48]

If this were the end of the inquiry, arbitrators faced with adverse action cases would have few problems. The "only for such cause as will promote the efficiency of the service" standard is analogous to the private sector's "just cause" standard. Moreover, as in the federal sector, arbitrators generally place the burden of proof in disciplinary actions on the employer. Accordingly, federal-sector arbitrators could apply principles similar to those applied to disciplinary actions in the private sector. Life is not this simple.

The problem confronting advocates and arbitrators in the federal sector derives from the implications and potential reach of the Supreme Court's decision in *Cornelius v. Nutt*. In that case, two Federal Protective Service officers working for the General Services Administration (GSA) were discharged for falsification of records. The grievants elected to appeal the adverse actions to

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[44] 5 U.S.C. §7701.
[45] 5 U.S.C. §7513(a).
[46] 5 U.S.C. §7701(c)(1).
[47] 5 U.S.C. §7121(e)(1).
[48] *Parsons v. Department of the Air Force*, 707 F.2d 1406 (D.C. Cir. 1983); *Cooper v. United States*, 639 F.2d 727 (Ct. Cl. 1980).

arbitration rather than to the MSPB. Arbitrator Nutt found that the grievants had engaged in the alleged misconduct and that normally this would justify removal, but mitigated the penalties because the agency failed to abide by certain "due process" procedures outlined in the parties' agreement. Among other procedural violations, the agency had repeatedly failed to inform either grievant of his right to have a union representative during all investigatory interviews. The agency sought review in the Federal Circuit and the court affirmed the arbitrator's decision in substantial part.[49] The Supreme Court reversed, however, asserting that the arbitrator was bound to follow the "harmful error" rule contained in 5 U.S.C. Section 7701(c)(2)(A), and that since the procedural errors identified by the arbitrator did not harm the grievants personally, but instead concerned rights of the union, the grievants were not entitled to reinstatement. The Court, although not declaring that federal sector arbitrators are bound to follow MSPB precedent, nevertheless stated that "Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision."[50]

Citing *Cornelius*, federal agencies are now arguing that arbitrators are required to follow MSPB precedent in adverse action cases and other minor disciplinary actions as well. Unions, of course, have asserted that arbitrators are only bound to follow the statutory standards applicable to the MSPB and not the specific precedent of MSPB case decisions. To the extent that arbitrators apply MSPB precedent (indications are that federal sector arbitrators accept agencies' arguments in this regard), arbitrators should be aware of MSPB and court decisions in the area of off-duty misconduct, particularly the so-called "nexus requirement." While a detailed recitation of court decisions is beyond the scope of this paper,[51] it is instructive to note the thinking of the MSPB in the off-duty area.

The lead case in the area of off-duty misconduct and the nexus requirement is *Merritt v. Department of Justice*.[52] In that

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[49]*Devine v. Nutt*, 718 F.2d 1048, 115 LRRM 2527 (1983).

[50]*Cornelius v. Nutt*, 53 USLW 4837, 4840, 119 LRRM 2905, 2909 (1985).

[51]Perhaps the MSPB said it best when it commented in *Merritt v. Department of Justice*, 6 MSPB 493 (1981), that:

> Any casual review of the many federal court decisions on this subject is bound to suggest a widespread lack of judicial consensus as to the requirements of the statutory standard, with results that appear clearly inconsistent under circumstances that seem distinguishable only by the most fanatical hairsplitter.

[52]6 MSPB 493 (1981). A May 27, 1986 search on LEXIS indicated that *Merritt* has been cited in some 95 MSPB decisions.

case a correctional officer with the Bureau of Prisons (agency) was discharged, in part, for possessing and using in his home a small quantity of marijuana, which Merritt admittedly shared on one occasion with two fellow employees during off-duty hours. The agency arged that Merritt's disregard of the law in possessing marijuana destroyed the trust that management must have in the grievant's vigorous enforcement of the institution's contraband regulations, particularly those prohibiting the possession and use of marijuana in the facility. Additionally, the agency argued that Merritt could be subject to "pressure and blackmail" by inmates who might learn of his offense. While the MSPB concluded that unlawful off-duty conduct, standing alone, did not *per se* effect "the efficiency of the service,"[53] the Board did indicate that, in some instances, particularly where the off-duty conduct was egregious, the conduct could raise the rebuttable presumption, or inference, that it affected the efficiency of the service. In such egregious cases removal would be appropriate even in the absence of any evidence produced by the agency of a nexus, unless the employee rebutted the inference by showing that the adverse action did *not* promote the efficiency of the service.[54] In *Merritt*, the Board held that possession and use of marijuana in the privacy of one's home was not so egregious as to justify applying the "presumption of a nexus." The discharge

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[53]In the words of the MSPB: "[C]onviction per se is not a prerequisite to the presumption of nexus in an otherwise appropriate case." The Board, citing *Doe v. Hampton*, 566 F.2d 265, 273 (D.C. Cir. 1973), went on to say this about the nexus requirement:

> In the law as well as logic, there must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest promoting the "efficiency of the service."

The rationale for that requirement was explained as follows:

> The nexus requirement serves the salutary end of helping to ensure against abuse of personnel regulations by mandating that an adverse action be taken only for reasons that are directly related to a legitimate governmental interest, such as job performance. As a corollary, it also serves to minimize governmental intrusions into the private activities of federal employees.
>
> The nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains. The question thus becomes whether the asserted grounds for the adverse action, if found supported by evidence, would directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission.

[54]The Third Circuit, in *Abrams v. Department of the Navy*, 714 F.2d 1219 (1983), has indicated that the presumption is "strong and secure," and that in order to rebut the presumption, the employee must clearly show that the off-duty misconduct did not adversely affect the employee's ability to perform his job *and* that it did not affect the ability of fellow employees to perform their work.

was reversed.[55] The presumption has been applied in cases involving robbery with a dangerous weapon,[56] assault with a deadly weapon,[57] off-duty shooting incidents,[58] forcible rape by a letter carrier[59] and other violent, criminal actions endangering human life.[60]

The case of *Backus v. Office of Personnel Management*[61] is particularly instructive and highlights the uphill battle faced by federal employees in rebutting the presumption of nexus. In *Backus*, a labor relations specialist was charged with aggravated assault in the shooting of his fiancee and was terminated. Although the criminal charges were dropped, the MSPB found that in light of the violent conduct involved, the presumed nexus applied. The grievant presented rebuttal evidence in the form of affidavits from several co-workers that they had no apprehension about working with the employee. While the Board indicated that this evidence may have rebutted the presumption, the agency overcame this rebuttal evidence, and thus established a nexus, by showing that "to *some* extent, people with whom [the employee] *might* have to work in the future do feel apprehension and have lost faith in him."

III. Summary and Conclusions

Since we are considering discipline and discharge, we start with the obvious but necessary assertion that for off-duty misconduct, as for all misconduct, the employer bears the traditional burden of demonstrating the existence of just cause for the penalty that has been imposed.

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[55]*See also, Fisher v. Department of Health and Human Servs.*, 8 MSPB 371 (1981) (off-duty distribution and sale of LSD by a file clerk not so egregious as to raise the presumption of nexus); *Person v. United States Postal Serv.*, 22 MSPR 618 (1984) (selling cocaine off-duty by city carrier not egregious behavior warranting application of the presumption). But see *Burkwist v. Department of Transp.*, MSPB Docket No. SE7528410166 (1985), where the Board found a nexus establishing the removal of an employee involved in the train movement system.

[56]*Johnson v. Department of Health and Human Servs.*, 22 MSPR 521 (1984).

[57]*Faint v. United States Postal Serv.*, 22 MSPR 495 (1984).

[58]*Honeycutt v. Department of Labor*, 22 MSPR 491 (1984).

[59]*Graybill v. United States Postal Serv.*, 22 MSPR 554 (1984).

[60]*Abrams v. Department of the Navy*, 714 F.2d 1219 (3d Cir. 1983).

[61]22 MSPR 457 (1984).

Most of the off-duty misconduct arbitration cases involve arrests, indictments, and/or convictions on criminal charges,[62] and the employer usually learns about such events from the media or from the employee's inability to report for duty.[63]

Although felonious off-duty misconduct is far more likely to be deemed just cause for discharge than is a misdemeanor, it is clear that a felony conviction is not, per se, a sufficient basis for the discharge of an employee. This is so, whether or not the employer has an announced policy to that effect.

The employer must also demonstrate that there is a valid nexus between the off-duty misconduct and the status of the grievant as an employee. The decisions indicate that this may be accomplished by showing that the misconduct has damaged the employer's business or will do so if the employee is reinstated; that fellow employees would refuse to work with the offender or would be exposed to danger from the offender; and/or that the

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[62]The authors believe that arbitrators should proceed with caution in ruling on a discharge where an employer merely offers the proof of conviction and argues that this alone establishes a nexus between the off-duty conduct and the job, especially where the grievant is a protected minority under Title VII and the parties' agreement contains a nondiscrimination clause. Specifically, in *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 10 FEP 1409 (1975), the Eighth Circuit held that an employer violated Title VII of the Civil Rights Act of 1964 by using a conviction record as an absolute bar to employment. The court found that since blacks are convicted at a higher rate than whites, the employer's practice of summarily rejecting all applicants with a conviction record (minor traffic offenses were excluded) had an adverse impact on a protected class under the statute. While *Green* concerned applicants for employment rather than individuals who are already employees, similar arguments have been successfully raised concerning terminations of present employees because of off-duty criminal convictions. *See, e.g.*, EEOC Dec. No. 73–0257 (1972), where the Commission found reasonable cause to believe that the statute was violated when an employer refused to rehire an employee who had been absent from work for 60 days due to incarceration. In the words of the Commission: "[T]he mere fact of incarceration would not lay a reasonable predicate for concluding that an employee is so anti-social, unsupervisable, etc., so as to make him an unreasonable risk for further employment." 5 FEP 963, 964. See also, EEOC Dec. No. 80–12, 26 FEP 1794 (1980), where the Commission declared that:

> Blacks are convicted at a rate significantly in excess of their percentage in the population. Thus, an employment practice of discharging persons from employment because of their conviction records can be expected to have a disproportionate adverse impact upon Blacks and would therefore be unlawful under Title VII in the absence of a justifying business necessity.

Id. at 1795. Among the factors that the EEOC suggests should be considered by an employer who has concluded that a conviction is "job related" are (1) the number of offenses and the circumstances of each offense for which the individual was convicted; (2) the length of time intervening between the offense and the employment decision; (3) the individual's employment history; and (4) the individual's efforts at rehabilitation. EEOC Dec. No. 78–35, 26 FEP 1755 (1978).

[63]There are also legal forms of off-duty misconduct or alleged misconduct, of course, such as political activities or whistleblowing by public-sector employees and so-called disloyalty in the private sector, such as moonlighting in direct competition with one's employer. The subject of employee loyalty is examined in Hill and Sinicropi, *supra* note 12, at 234–248.

nature of the misconduct is disqualifying, in that it is incompatible with the duties and responsibilities of the employee's job classification.

Often, it is the offender's incarceration that becomes the formal basis for discharge, since she or he is not available for work. Employers have generally been upheld when denying leaves of absence or refusing to reschedule vacations to cover periods in jail. On the other hand, a brief period of unavailability that may exceed the stated contractual maximum for nonexcused absences will not automatically support discharge.

It is also well established that employers are not required to defer any action until the courts have determined guilt. The employer's authority in this regard was well expressed, twenty years ago, by Arbitrator Robert L. Howard:

> But whether we consider this type of action [i.e., suspension pending court determination of guilt] as disciplinary or not, and notwithstanding the presumption of innocence in a criminal proceeding, the employer must have the right to protect his business from the adverse effects flowing from public accusation and arrest for serious crime, supported by a judicial finding of probable cause in a preliminary hearing, when the nature of the charge with its attendant publicity reasonably gives rise to legitimate fear for the safety of other employees or of property, or of substantial adverse effects upon the business.[64]

In cases where the employer has no independent evidence of guilt, suspension pending the outcome of the trial, rather than discharge prior to a determination of guilt, is normally the appropriate action. But where there has been substantial publicity concerning egregious misconduct, and it is evident that the employee's retention will damage the business, discharge may be justified before trial.[65]

Whether the nexus is sufficient to overcome the presumption that an employee's off-duty behavior is not subject to the employer's control is, as we have seen, dependent on many considerations. The characteristics of the employer may be critical. If it is claimed that the off-duty misconduct has adversely affected or

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[64]*Pearl Brewing Co.*, 48 LA 379, 390 (1967), quoted in Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985), at 659. See other case citations at pp. 658–660.

[65]*See, e.g.*, Arbitrator Greenbaum's case, discussed at pages 127–128, in which Postal Inspectors found a commission salesman for a small producer and distributor of phonograph records with child pornography materials in which he was evidently dealing.

will harm the company's reputation or sales, or both, this may be of greater concern for firms that operate in highly competitive, consumer-oriented markets (e.g., airlines, retail stores, private schools, health clubs, day-care centers) than for oligopolistic firms with producer-oriented markets.

The location of the employer may be a factor. A prominent employer in a small isolated town may be legitimately more sensitive to scandal based on off-duty misconduct than an anonymous employer in a large metropolitan area.[66]

The nature of the misconduct: Violent, destructive, or perverted actions may reinforce the nexus more than crimes of the so-called white-collar variety (e.g., tax evasion). A misdemeanor (e.g., marijuana possession) is much less likely to be considered just cause for discharge than a felony (e.g., marijuana sales).

The occupation of the offender: Many decisions have hinged on a link between the employee's job duties and obligations and the content of the misconduct. It is not hard to demonstrate a nexus when a police officer commits a felony off-duty, when a teacher molests a child off-duty, when a sales clerk is convicted of shoplifting (from someone else's store), or when a bank teller has embezzled funds from his church's treasury. The extent and nature of the grievant's customer contacts are important, especially as they relate to the type of misconduct. Committers of sex crimes or property thefts will probably not be retained in jobs that entail entering customers' homes.

Finally, there is the extent and kind of publicity. When the public's attention has focused on the misconduct and the miscreant has been clearly identified with the employer, the nexus is reinforced. Often, of course, it is the publicity that caused the employer to become aware of the off-duty misconduct.

It is obvious, in this context, why so many of the cases have arisen in connection with flight attendants, security guards or police officers, and other kinds of employees who deal with the customers of firms or governmental units that are concerned about their reputations for economic or political reasons, or both. As Arthur Ross observed, "you will not find the answer by comparing the intrinsic culpability of different grievants." A case must be made for the nexus, or the grievant who has misbehaved while off-duty is entitled to remain an employee.

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[66]*See, e.g.*, Arbitrator Elvis Stephens' case, discussed at note 21 and accompanying text.