II. A MANAGEMENT PERSPECTIVE

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Like Bill McHugh, it is with some trepidation that I speak to you this afternoon. I should add that some of my partners and associates share this sense of trepidation for the simple reason that they do not agree with everything I am about to say. Nevertheless, I very much appreciate the opportunity to appear before you and hope that my comments and observations will help advance the dialogue on this topic, a topic of such great importance to us all.

It is, of course, no secret that drug and alcohol abuse is a serious problem, perhaps for the vast majority of employers in the country. Estimates of the costs of drug and alcohol abuse to the economy are not very precise, or necessarily very reliable. It is worth noting, however, that they range anywhere from $33 billion to $100 billion per year. It is fair to assume that, whatever the current costs to the economy may be, they are destined to increase as the problem of drug and alcohol abuse continues to grow.

Perhaps the most troubling statistics of all involve the scope of drug use nationwide. According to a 1986 study by the National Institute on Drug Abuse (NIDA), nearly two thirds of those entering the workplace for the first time have used illegal drugs; 44 percent of these individuals have used illegal drugs within the last year; the study further notes that 10 to 23 percent of all employees use drugs on the job. NIDA estimates that in 1985 nearly 37 million Americans used illegal drugs; that is, 20 percent of everyone in the country over the age of 12. Finally, the 1986 National Survey on Employee Attitudes discloses that one in five employees believes that drug usage by co-workers has seriously affected productivity at their places of employment.[1]

In light of these statistics, it is hardly surprising that drug testing seems to be here to stay. A recent survey of 1,090 companies conducted by the American Management Association revealed that by January 1987 one-half of the Fortune 100 firms did pre-employment testing in at least one location and testing "for cause" at most facilities. Slightly more than 20 percent of all

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[1]1987 Daily Lab. Rep. (BNA) No. 129:A-13.

the companies surveyed used drug testing to some degree. Drug testing also appears to be accepted by the American work force. Nearly two-thirds of the employees who were participants in the National Survey of Employee Attitudes supported testing of applicants and suspected users; a slight majority, however, opposes random testing.

The dramatic nationwide increase in the number of employers implementing drug-testing programs, combined with the understandable willingness of those testing positive to challenge test results, has led to an equally dramatic increase in the volume of drug testing and related litigation. As a result, the law in this area is developing, almost literally, on a daily basis. It seems to me that it might be useful to step back for a moment and attempt to analyze objectively what has happened in the last few years. By doing so, we may be better able to identify and prepare for what companies, unions, and arbitrators are likely to confront in the years to come.

It is often tempting, and always dangerous, to try to reduce significant developments in the law to a few basic principles. Nevertheless, I have decided to do just that: to give in to temptation and suggest to you that much of the recent activity in this area can be distilled into three basic propositions. The first is that, for better or for worse, drug testing is here to stay, at least for the foreseeable future. The second proposition is that, when done correctly, drug testing works. My last proposition is that, because drug testing and litigation involving drug testing are such emotional issues, arbitrators in particular have an obligation to distance themselves from the emotion and get back to basics; that is, to get back to doing what arbitrators do best—and are paid to do—to decide, on the basis of language agreed to by the parties, whether a collective bargaining agreement has been breached.

As the title of this program suggests, and as I noted a few moments ago, the drug problem in this country is getting worse, not better. Consequently, employers are likely to continue responding to the problem with drug-testing programs. Moreover, there seems to be growing union acceptance of drug-testing programs, even if only as a trend that can't easily be reversed.[2] As a result, the focus of collective bargaining may well

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[2]For example, the construction trades in several states, such as Texas, have agreed to drug-testing programs. *See* Dallas Times Herald, 43 (Sept. 26, 1986).

turn to the negotiation of controls on testing procedures, for example, language prohibiting random testing, rather than attempts to ban completely any form of testing. The net effect of this perceived need for testing programs and the union acceptance of them—even grudging acceptance—virtually guarantees that drug testing is going to be with us for some time to come.

The second fundamental proposition is that drug testing, if reasonable in scope and properly conducted, works quite well, not only as a matter of the science involved, but also as a matter of good employee and industrial relations practice.

A good drug-testing program is, in essence, a function of professionalism and consistency. There are certain obvious indicators of the appropriate levels of professionalism and consistency in testing programs and in disciplinary actions based on testing programs to which you, as arbitrators, should be particularly sensitive.

One key indicator of a good program is the job-relatedness of the test. In general, the decision to administer a drug test should be linked to the functions of a particular job and to an employee's ability to perform those functions. That is, the more directly a drug test is predicated on an employee's perceived inability to perform job duties, the more likely that the testing program will be viewed favorably by triers of fact.

This is not to say that all testing should be premised only on objective evidence that a person is, or may be, under the influence of drugs. Where safety on the job is clearly involved or where sensitive data or materials are being handled, a different standard should be applied.[3] In such situations, random testing is, I believe, entirely appropriate unless it is prohibited for some constitutional, statutory, contractual, or other reason.[4]

Just an aside on the random testing issue. The American Management Association study I referred to earlier quoted an unnamed "civil liberties lawyer" as follows:

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[3]*Cf. Bay Area Rapid Transit Dist.*, 88 LA 1, 5 (Concepcion, 1986) (arbitrator found drug policy defective because employees in nonsafety-sensitive positions were subject to same policy as those in safety-sensitive positions; employees in the latter group have a reduced expectation of privacy and "deserve greater security as far as actual or possible drug or alcohol abuse are concerned").

[4]With respect to public employees, a number of courts have approved random testing programs where the employer's operations were inherently dangerous or highly regulated by government authorities. *See, e.g., McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (prison employees in contact with prisoners); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, ___ U.S. ___, 55 USLW 3392 (1986) (horseracing jockeys); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510 (D. Neb. 1987) (nuclear plant employees).

> I'm dead set against the idea of mandatory drug testing—right up to the time I get onto an airplane.

This is a perfectly rational view and one, I suspect, most of you would agree with, at least in a private poll.

On the other hand, in situations involving job classifications not so obviously linked to safety—clericals and mailroom attendants, for example—it is considerably more difficult to justify random testing. It follows, of course, that it is very difficult, but by no means impossible, to rationalize testing based on off-the-job drug use.

I've found that a good way to outline briefly some of the other indicators of a well run drug-testing program is to ask a few basic questions that should be asked and answered when considering the merits of a testing program. Bear in mind that the answers to certain of these questions are not easy and may vary greatly depending on the workplace. I'm certainly not going to ask all the questions here this afternoon; moreover, I'm not even going to answer many of the questions I'm about to ask.

A basic indicator of the quality of a drug-testing program is the type of person in charge of the program. What are that person's qualifications, areas of specialty, and certifications? What are the qualifications of the program's staff members? What is the extent of their training and experience?

The mechanics of a testing program, including subjective items such as supervisor-training programs, are critical to gauging its professionalism. I might point out that employers often overlook or give short shrift to supervisor training programs in the rush to find the best test or the best outside lab. It is critical that this not happen. Supervisors should be trained in the unique employee relations issues that drug testing presents. Drug-testing issues simply cannot be handled in the same way as clocking in late or garden-variety insubordination.

The mechanics of a testing program also include, of course, nuts-and-bolts considerations. For example, who gets tested, and why? Is it applicants? All applicants? Employees? All employees? What is done about vendors and independent contractors? Are random tests given? If so, why? If tests are given at other times, when and why?

The list goes on. What type of test is used? How does it work? What substances are tested for? Why are certain substances not tested for?

For urine tests, are observers used in the sample-gathering process?[5] How are samples handled? How are they labeled? Where are samples taken? How are they taken there? What will be deemed a "positive" test? Who gets test results, and why? What lab does the confirming test? Why was that particular lab chosen? What type of confirming test is done? How does it work? How are samples taken to the confirming lab?

The list of questions is almost endless. But they all highlight critical areas of concern which cannot be emphasized enough in assessing the professionalism of a testing program: First, the best qualified people and labs must be used. Second, the chain of custody must be carefully maintained. Finally, the privacy interests of those being tested must never be lost sight of. The test results coming out of any program where these basic criteria are acknowledged and met are likely to be highly reliable.

A program where these criteria are met (i.e., a successful program) has, I believe, significant deterrent effect. One of my own arbitration and bargaining experiences in the drug-testing area illustrates this point quite well.

The bargaining unit in question was comprised of approximately 200 security guards. In 1980, the company unilaterally implemented a drug-testing program based on its interpretation of the management-rights clause in the collective bargaining agreement and a work rule prohibiting the sale, possession, or use of drugs. Early in the program, two security guards tested positive for tetrahydrocannabinol, or THC, the hallucinogenic substance found in cannabis or marijuana. Rather than take immediate disciplinary action, the employer advised the employees of their test results and said that the results would be disregarded if, upon being tested again, the results were negative. They were also told that the second tests would be given at any time, without notice, within the next 60 days. When the test was given again, the employees tested positive. This time they were discharged. The theory of the discharge was that a positive test result was tantamount to "possession" of drugs in violation of the applicable work rule.

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[5]The presence of observers may, under certain circumstances, violate an employee's right of privacy. *See, e.g., Union Plaza Hotel*, 87-1 ARB¶8072 (McKay, 1986) (employee entitled to refuse to submit urine sample because of lab's refusal to accommodate her reasonable privacy concerns).

Perhaps not surprisingly, the arbitrator who heard the case reinstated the employees. The essence of his decision as to the "possession" theory is perhaps best described as, "Are you serious?"

In any case, during the next collective bargaining negotiations, there was hard, difficult bargaining over drug-testing language. Because of the nature of the business and the responsibilities of the employees in the bargaining unit, the employer sought language keying disciplinary action to test results, not to evidence of impairment. Ultimately, language to this effect was agreed upon.

During the first year of the new agreement, three employees tested positive for THC. Each of the three employees was discharged. Each discharge was heard by a different arbitrator. Each of the discharges was sustained.

Ironically, the next employee who tested positive was one of the two employees whose discharge in 1980 led to the first arbitration case which, in turn, led to the drug-testing language in the collective bargaining agreement. To the union's credit, when this employee was discharged, no grievance was filed. But most significantly, in the nearly 18 months since that employee tested positive without a grievance filed on his behalf, not one other employee has had a positive test result for any substance. I can't empirically establish that this happened solely because the company has an effective drug-testing program; on the other hand, I think that it is more than mere coincidence. In short, common sense alone tells you that the program has had at least some deterrent effect.

The last of my basic propositions is perhaps the most obvious, but also the most difficult to deal with; that is, that drug testing and related issues are highly emotional subjects. First, complex social and societal issues are involved. For example, to what extent should an employer be in a position of arguably regulating off-the-job conduct of its employees?[6] If employers should

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[6]Given that a positive drug test in and of itself cannot pinpoint the time of drug usage, employers are unable to use the test as primary evidence of on-the-job drug use or impairment. *See, e.g., CFS Continental, Inc.*, 86-1 ARB ¶8070 (Lumbley, 1986); *Georgia-Pacific Corp.*, 86-1 ARB ¶8155 (Clarke, 1985). *See also Boone Energy*, 85 LA 233 (O'Connell, 1985) (test does not establish impairment; merely shows past exposure to drugs); *Kroger Co.*, 86-2 ARB ¶8407 (Wren, 1986) (positive drug test insufficient to show on-the-job use or effect upon work performance). Thus, the issue often becomes whether the employer can discipline an employee for off-duty use of drugs. *See Weyerhauser Co.*, 86 LA 182

not be involved in the off-the-job activities of their employees, should they be involved, through employee assistance programs, in the long-term medical rehabilitation of employees who become addicted to drugs off the job? If so, who should pay for such programs?

Second, the political crosswinds in this area are very strong. This is particularly so in the public sector, but the fact that every politician in the country seems to have a position on how best to solve the drug crisis clearly has a trickle-down effect in the private sector. Finally, attempting to regulate drug use and abuse often presents very difficult criminal law and constitutional issues, issues that we all know are not easily handled in the arbitration context.

What do my three fundamental propositions—that drug testing is here to stay, that under the right conditions drug testing works, and that this is a highly emotional area—mean for arbitrators and the arbitration process?

From my perspective, that of a management lawyer who has negotiated drug-testing clauses and tried a number of drug-testing and drug-related arbitration cases, it seems that arbitrations over drug-related issues are likely to increase. There are enormous, and growing, internal and external pressures on employers to implement testing programs. As a result, employers with union-represented employees are likely to do one of two things; either attempt to construe the language of existing agreements to permit the unilateral implementation of testing programs or, where this cannot be done, bargain hard for testing language. Over time, more employers and more unions will recognize that it is in their mutual interest to include specific drug-testing provisions in collective bargaining agreements.

Whether employers unilaterally implement or negotiate testing programs, the number of drug-testing and related cases will almost certainly increase, at least for the next few years. Arbitration may not be a very good forum for resolving such cases but, for better or for worse, it is the one we have and it is the one we will have to live with. This does not mean that the arbitration

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(Levin, 1985) (off-duty drug use, detected by positive drug test, may only form the basis for discipline if the employer offers sufficient evidence of on-duty impairment). *Cf*, *Union Oil Co. of Cal.*, 87 LA 297 (Boner, 1985) (given safety-sensitive nature of the job, positive drug test, even though not evidence of on-duty impairment, is sufficient basis for discipline). As to the issue of discipline for off-duty conduct generally, *see* Hill and Kahn, *Discipline and Discharge for Off-Duty Misconduct: What Are the Arbitral Standards*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1987), 121.

process cannot be improved upon. To attempt to eliminate the well documented inconsistencies among arbitral awards, and perhaps to simplify the trial of these cases, I suggest that you as arbitrators make every effort to minimize the amount of personal or emotional or political or philosophical baggage you bring to the hearing of drug cases. To that end, it seems to me that a back-to-basics movement of sorts may be in order.

Not surprisingly, the cardinal tenet of this movement is that contract language must control. Cases are before an arbitrator because of a provision in a collective bargaining agreement; the parties are entitled to no more, and to no less, than they bargained for. I typically advise employers that, for the most part, a loosely drafted management's-rights clause that does not at least reserve to the employer the right, for example, to evaluate the qualifications of employees on an ongoing basis, may not be a good vehicle to use to attempt to initiate a drug-testing program over the objections of a union. By the same token, where an agreement has drug-testing language and procedures, or where drug testing has been recognized as a work rule extension, the union should not be allowed to nitpick to avoid the results that the parties obviously intended.

Second, particular care must be taken to decide cases only on the relevant record evidence and by applying the appropriate standards in assessing that evidence. For example, the union may argue that alcoholism is a far more serious problem in the workplace than drug use. You may agree with that proposition. I do agree with that proposition. But so what? What does that have to do with whether or not an employee's drug-related discharge is permissible under a given collective bargaining agreement? In my view, nothing at all.

The medical experts and medical literature that may be produced must be carefully scrutinized, but within the context of the case in question. Take the passive-inhalation-of-marijuana theory. In very general terms, this theory holds that a person can have a positive urine test for THC simply by breathing in marijuana smoke produced by others actually smoking marijuana. Yes, under certain very extreme circumstances passive inhalation may possibly result in a positive test. But did it happen in the case before the arbitrator? Probably not.[7]

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[7]*See* Schwartz and Hawks, *Laboratory Detection of Marijuana Use*, 254 J. Am. Med. A. 788, 791 (Aug. 1985) (based upon current screening methods and results of past scientific studies, it is "highly improbable" that passive inhalation could generate positive test result).

Regrettably, perhaps, I cannot let this opportunity pass without a word or two on the burden-of-proof issue. Many arbitrators, if not most, tend to feel that where conduct having criminal overtones is at issue, the criminal burden-of-proof standard of "beyond a reasonable doubt" should apply.[8] Rather than argue that this should not necessarily be the case—an argument I have lost before a number of you in this room far more often than I have won—let me suggest that, if this is the standard to be used, at least it should not be blindly adhered to. Take the much maligned front-line supervisors who, in addition to every other burden they carry, now must be trained in the detection of symptoms of drug use. However well they are trained, they will never be toxicologists; they should not have to determine "beyond a reasonable doubt" that an employee should be sent to have a drug test. If the supervisor's judgment that a drug test should have been administered was made in good faith—if it was reasonable, taking into account the relevant facts and circumstances—it should be accepted.

Third, we all recognize the stigma that attaches to a person who tests positive for drug use and then is disciplined or discharged. But this is no reason to shy away from making tough credibility assessments. For example, in every marijuana case I've tried (and I suspect in almost every one any of you has heard), a basic defense of the grievant is the passive inhalation theory to which I just referred; that is, "everybody in the small, unventilated room but me was chain-smoking marijuana for hours and I must have breathed some of it in." Grievants come up with amazing stories to try to support this defense. In one case I tried, the grievant testified under oath that he had not smoked marijuana in almost 20 years. He further testified that, one week prior to being tested, he went into a windowless, unventilated bathroom that measured 8′ × 8′. The bathroom had one sink and one toilet. He said that the air was so thick with marijuana smoke that he could see it, but not much else. He added that, including himself, four people were in that 8′ × 8′ windowless, unventilated bathroom and that he waited there 15

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[8]But many arbitrators have rejected the use of the "beyond a reasonable doubt" standard in cases involving the use or possession of drugs. *See, e.g., Utility Trailer Mfg. Co.*, 83 LA 680 (Richman, 1984); *Burns Int'l Sec. Serv.*, 78 LA 1104, 1107 (Traynor, 1982); *Brooks Foundry*, 75 LA 642 (Daniel, 1980, *Hoover Universal*; 73 LA 868, 870-71 (Gibson, 1979); *General Tel. Co. of Cal.*, 73 LA 531, 533 (Richman, 1979); *Isaacson Structural Co.*, 72 LA 1075 (Peck, 1979); *Pacific Tel. & Tel. Co.*, 56 LA 1191 (Hughes, 1971).

minutes to use the toilet! The arbitrator was, I think, as dumbfounded as I was and did not credit that preposterous, obviously fabricated story. My point is that no arbitrator should credit ridiculous testimony, testimony that would never otherwise be credited, just because it arises within the context of a highly emotional drug case.

Finally, I would urge that you keep reminding yourselves of what we all know is at issue in most drug-testing cases: the very narrow question of whether or not there is just cause to discipline or discharge an employee. Your obligation as arbitrators is to tell the parties that the contract does or does not permit the action in question, and then to explain why.

Ultimately, companies and unions are going to have to solve the drug-testing problem, as they see fit, at the bargaining table. What may be agreed upon in negotiations may not have all the components of a perfect drug-testing program. It may not meet my standards; it may not meet yours. But with all due respect, giving the parties your personal views on what they should have done or might have done to better address the problem is likely to complicate further an already complex area.

After much thought, I decided that my final words to you should be no different from my final words to the employer groups I often speak to on this subject: Common sense goes a long way in this area. In most cases, doing the fair thing, doing the reasonable thing, taking into account all the relevant circumstances will probably serve all concerned quite well.

III. DRUG ABUSE IN THE WORKPLACE: ARBITRATION IN THE CONTEXT OF A NATIONAL SOLUTION OF DECRIMINALIZATION

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Most of the current literature on drug abuse explicitly works from the premise that we are experiencing a new and explosive drug "epidemic" (as it is frequently described), which will corrode the American work force and seriously undercut its productive capacities. Articles on drug abuse in the workplace quote estimates that industry is sustaining annual productivity losses

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