tant, whether or not it is justifiable on an objective basis. The results of this study and the authors' earlier, companion study challenge the "experience myth" in relation to actual and expected arbitration outcomes. Is this preference a bias? Is there a bias against finding out?

II. REMEDIES, TROUBLED EMPLOYEES, AND THE ARBITRATOR'S ROLE

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Background: The "Just Cause" Standard

The standard of review for most, if not all, discharges is that of "just cause." The term "just cause" is generally held to be synonymous with "cause," "proper cause," or "reasonable cause." While there is no uniform definition of just cause, a sampling of arbitral opinion indicates some basic notion of fundamental fairness as the underlying criterion for evaluating dismissals.

Arbitrator William Belshaw, in *Hiram Walker & Sons, Inc.*,[1] sustained the dismissal of a fork lift operator—a capable, intelligent, long-term employee (25 years)—who was found to be under the influence while on the job. Belshaw noted that "he [the grievant] blew the deal not once but twice [the grievant had one other alcohol-related incident], and, despite that, made a really insufficient effort to either solve the problem or save his job (the same thing)." What is particularly instructive is the arbitrator's analysis and approach in ruling as he did. Addressing the concept of just cause, Belshaw had this to say:

> There are many definitions of "just cause." All of them, however, sooner or later, get back to some evaluation of industrial punishment in the light of mores, those behavioral rules that structure a society, like it or not. And it is a very individual process, in arbitration, at least, because the determiner is, indeed, both single and final.

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[1]75 LA 899, 900 (Belshaw, 1980).

> In years of exposure and study and thought, both to and of the bad as well as the good, some conclusions have inevitably emerged, and one of them is a definition of what "just cause" probably is, for here and now. It seems to be that cause which, to a presumably-reasonable determiner (is there one here?), appears to be (not necessarily is), fair and reasonable, when all of the applicable facts and circumstances are considered, and are viewed in the light of the ethic of the time and place. That's a mouthful, in words, but it really is only, bottom-line, another expression of the now-common expression, "fair shake."

In sustaining the discharge the arbitrator stated in a footnote that "there has been no ignoring of the modest, single-letter showing of the grievant's rehabiliatory efforts. They seemed both little and late."

Perhaps the most often-quoted statement of the criteria used by advocates and arbitrators is in the form of a series of questions provided by Arbitrator Carroll Daugherty.[2] [Editor's note: Daugherty's Seven Tests are enumerated in the Addendum to John Dunsford's presentation in Chapter 3.]

In *Ritchie Industries*,[3] Arbitrator Raymond Roberts outlined the usual standards for nondisciplinary discharge as follows:

1. That the cause or reason for nondisciplinary discharge substantially impairs the employment relationship.
2. That the cause has been chronic or, by its inherent nature, clearly will be so.
3. That there is no reasonable prognosis that the cause will be removed in a reasonable period of time.

The common link in most decisions is this: Any determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case. Further, the universal rule in grievance arbitration is that the employer must carry the burden of proof of just cause in a discharge case.

Remedies, Just Cause, and the Troubled Employee

Thomas Miller and Susan Oliver, in a paper presented at the 1989 Annual Meeting of the Academy, query whether

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[2]*Enterprise Wire Co.*, 46 LA 359, 363–364 (Daugherty, 1966); *Grief Bros. Cooperage Corp.*, 42 LA 555, 558 (Daugherty, 1964).

[3]74 LA 650, 655 (Roberts, 1980).

arbitrators apply traditional concepts of just cause to troubled employees who engage in misconduct or unsatisfactory job performance. They point out that troubled employees argue that they would not have engaged in the misconduct warranting discipline, but for their alcohol or chemical dependency problem. Also, employees maintain that their successful treatment following termination should justify mitigation of the discharge penalty. The authors note that a review of airline arbitration decisions indicates that there is a divergence of opinion among arbitrators as to whether the alcohol or chemical dependent employee who has engaged in misconduct should be subject to the traditional just cause standard. Miller and Oliver, citing Denenberg & Denenberg, *Alcohol and Drugs: Issues in the Workplace*,[4] submit that many arbitrators have adopted three approaches in deciding discharge cases where alcohol or chemical dependency is asserted as a defense:

1. *Traditional Corrective Discipline Model.* Arbitrators using this approach uphold discipline or discharge without regard to an employee's claimed alcoholism or chemical dependency so long as the employer has properly adhered to all pertinent disciplinary requirements.
2. *Therapeutic Model.* Under the therapeutic model, alcoholism or chemical dependency is viewed as an illness warranting opportunities to recover, including leaves of absence and rehabilitation. An employee's subsequent failure to refrain from misconduct or to correct performance deficiencies is not viewed as cause for discipline, but rather as indicating the need for additional treatment.
3. *A Modified Corrective Discipline Model.* This approach takes a middle ground between the traditional corrective discipline model and the therapeutic model. Arbitrators advocating this approach view alcoholism or chemical dependency as an illness, and will routinely allow one "second chance" after there has been some opportunity for rehabilitation. However, should there be a subsequent failure to correct the behavior, the employee will be held fully accountable.

The authors assert that arbitrators adjudicating airline cases appear to limit their approach to either the traditional corrective discipline or the modified corrective discipline models. We submit that arbitrators reach the same result in nonairline cases.

Under what conditions is an arbitrator likely to apply the corrective discipline model to a discharge case involving a "trou-

[4]Miller & Oliver, *Just Cause and the Troubled Employee: Management Viewpoint*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989), 40–41, citing Denenberg & Denenberg, Alcohol and Drugs: Issues in the Workplace (Washington: BNA Books, 1983), 3.

bled" employee? When a troubled employee is reinstated, does it follow that a conditional remedy will issue? In *Crewe v. United States Office of Personnel Management,*[5] the U.S. court of appeals considered a claim under the Rehabilitation Act of 1973.[6] In discussing alcoholism the court stated:

> At the outset there can be little doubt that alcoholism is a handicap for the purposes of the Act. The Attorney General of the United States has so concluded, 43 Op. Att'y Gen. 12 (1977); the federal agency charged with implementing the Act (the Merit Systems Protection Board) has agreed, *Ruzek v. General Services Administration*, 7 M.S.P.B. 307 (1981); *Rison v. Department of the Navy*, 23 M.S.P.B. 118 (1984). Commentators also agree, Richards, "Handicap Discrimination in Employment: The Rehabilitation Act of 1973", 39 Ark. L. Rev. 1, 9-10 (1985); Comment, "Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and The Wisconsin Fair Employment Act", 1983 Wisc. L. Rev. 725 (1983); and the federal courts have concurred. *Whitloc v. Donovan*, 598 F. Supp. 126, 129, 36 FEP Cases 425 (D.D.C. 1984), aff'd without opinion, 790 F.2d 964, 45 FEP Cases 520 (1986).[7]

Later in the same opinion the court noted:

> In determining whether to hire persons with a prior history of alcohol abuse the federal government has adopted the following policy:
>
> In considering applicants for federal employment who have a history of alcoholism . . . the Office of Personnel Management will make its determination on the basis of whether or not the applicant is a good employment risk. In such cases, the length of time since the last abuse of alcohol . . . is less important than the steps taken by the applicant to obtain treatment of his or her illness through medical care, rehabilitation, and similar actions.[8]

Arbitrators have recognized the potential for successfully overcoming the debilitating effects of alcoholism and other disabilities "subject to cure," even after repeated relapses by the employees. In *Thrifty Drug Stores Co.*,[9] the arbitrator agreed with the union that relapses in the treatment of chronic alcoholism were a common occurrence and that the main problem in alcohol treatment was getting patients to accept that they had a problem. Arbitrator Edward Peters ruled that "the grievant should be given yet another opportunity to demonstrate that he

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[5]834 F.2d 140, 45 FEP Cases 555 (8th Cir. 1987).
[6]29 U.S.C. §701–794.
[7]*Supra* note 5, 45 FEP Cases at 556.
[8]*Id.* at 557.
[9]56 LA 789, 794 (Peters, 1971).

has managed to acquire an acceptable control over his problem." What is particularly interesting is that the arbitrator did not formulate a conditional remedy of any kind, but simply reinstated the grievant with all contractual benefits, but without back pay. He noted that if the employee still retained the illusion that he could handle one or two drinks, "then the outcome of this arbitration will accomplish no more than to defer for a few weeks or months his inevitable termination."

In *City of Buffalo*,[10] the grievant, an account clerk stenographer and a 15-year employee, was found intoxicated at work and given a leave of absence to be hospitalized, after which she enrolled in Alcoholics Anonymous (AA). She was then discovered drunk at work again and discharged. In reducing the penalty to a two-month suspension, the arbitrator concluded:

> Taking into consideration B--'s employment and her willingness to faithfully attend Alcoholics Anonymous and group therapy with the Alcoholism Clinic, the penalty of discharge is too severe.[11]

In *Chrysler Corp.*,[12] an employee was dismissed for reporting to work under the influence. The record indicated that the grievant had been repeatedly admonished and penalized for alcohol abuse at work. Arbitrator Gabriel Alexander, in overturning the dismissal, credited the grievant's postdischarge rehabilitation and reasoned:

> [T]he evidence shows clearly that since he was discharged, Grievant has done the sort of things that an alcoholic should do. He placed himself under the care of his physician. He joined Alcoholics Anonymous, and has regularly attended its sessions. He has taken help from a church, and from an alcoholic treatment center maintained by the City of Detroit. Representatives of those agencies and his doctor have issued written statements to the effect that he is doing well. No contradictory evidence was submitted on that point. Accordingly, the Chairman concludes that Grievant has been making progress on the road towards control of his addiction.[13]

What is interesting is that the arbitrator rejected the employer's plea that the employee had ample opportunity to reform his conduct before he was dismissed and that, therefore, no mitigating significance should be accorded his subsequent efforts. No conditional remedy was ordered by Alexander

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[10]59 LA 334 (Rinaldo, 1972).
[11]*Id.* at 337.
[12]40 LA 935 (G. Alexander, 1963).
[13]*Id.* at 936.

although the facts arguably called for one. In all these cases reinstatement was ordered after the employee suffered a relapse.

The significance of an employee's demonstrating a strong desire to rehabilitate which affects the arbitrator's award is seen in *Armstrong Cork Co.*[14] The employee was discharged after his third absence from work because of a drinking problem. The arbitrator ruled that:

> The violation occurred not because of an indifference toward the Company rules but because [the Grievant] was emotionally and physically sick. He testified that he was an alcoholic and this fact must be taken into account in assessing the punishment. . . .
>
> * * *
>
> Since the discharge, the uncontradicted evidence is that B-- not only has joined Alcoholics Anonymous but has regularly attended its meetings and has not had a drop to drink. In view of the fact that it is now more than eight months since his discharge this is impressive evidence of a serious effort at self-rehabilitation.[15]

In ordering reinstatement, the arbitrator imposed the following conditional remedy:

> * * *
>
> B-- is directed to supply the Company Personnel Manager with written verification from his Alcoholics Anonymous group chairman of his attendance at Alcoholics Anonymous meetings. This will be done on a monthly basis for six months.
>
> If B-- is AWOL during said six months period, the full history upon which the Company relied in this case shall be considered in imposing punishment notwithstanding any Company policy to remit penalties occurring beyond the allowed time limits.
>
> At the end of six months, without being on AWOL, B-- is to be treated in the normal way under the contract and Company rules.[16]

In *Texaco, Inc.*,[17] a 20-year employee with two prior alcohol-related suspensions was discharged for coming to work under the influence. Following the discharge he met with a physician, attended AA, and was given medication. He had eight months of sobriety before the arbitration hearing. In ordering reinstatement, Arbitrator Paul Prasow stated that there was no quick cure for alcoholism and that the alcoholic needed support. Though

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[14]56 LA 527 (Wolf, 1971).
[15]*Id.* at 529–530.
[16]*Id.* at 530–531.
[17]42 LA 408 (Prasow, 1963).

there was a risk, the possibility of recovery could provide great benefits to the alcoholic, his family, the company and society.

While not forming a conditional remedy (the arbitrator simply ordered reinstatement without back pay), Prasow noted in his opinion that he hoped the grievant would continue his rehabilitation, and "that any future deviation from strict sobriety on the job will warrant immediate termination."[18]

Similarly, in *Pacific Northwest Bell Telephone*,[19] the arbitrator noted that postdischarge efforts at rehabilitation are relevant in evaluating whether just cause for discharge exists and the severity of the penalty. In the arbitrator's words:

> [I]f the discharged employee proves after this discharge that he has a significant chance for recovery, the officials must have misjudged him and have given him too severe a penalty. The arbitrator even if he upholds the officials' charge, may reduce the penalty to give the offender another chance.

Harter cited with approval a decision by Arbitrator Louis Kesselman as follows:

> Before an alcoholic is disciplined or discharged Kesselman would require:
> (1) that the employee be informed as to the nature of his illness.
> (2) he must be directed or encouraged to seek treatment.
> (3) he must refuse treatment or
> (4) he must fail to make substantial progress over a considerable period of time.[20]

The remedy was drafted as follows:

> [T]he Employer may have the option to retire the Grievant on a service pension.
> . . . [T]he Employer may restore the Grievant to duty subject to involuntary retirement if he should miss work because of drinking, if he should drink on the job, or if he should be arrested for driving under the influence of alcohol.[21]

* * *

There is no question that postdischarge rehabilitation is a determinative factor in reinstating a discharged alcoholic or drug abuser.[22]

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[18]*Id.* at 412.
[19]66 LA 965, 973 (Harter, 1976).
[20]*Id.* at 973, citing *American Synthetic Rubber Corp.* 71-1 ARB ¶8070 (Kesselman, 1973).
[21]*Id.* at 975.
[22]*See, e.g.*, Greenbaum, *The "Disciplinator," the "Arbichiatrist," and the "Social Psychotrator": An Inquiry into How Arbitrators Deal With a Grievant's Personal Problems and the Extent to Which they Affect the Award*, 37 Arb. J. 51, 59–61 (1982).

In short, even if the grievant took no rehabilitative efforts before termination, where the misconduct at issue occurs because of a condition subject to "cure" rather than from willful misconduct, arbitrators will consider whether the grievant has taken the necessary steps to be "cured" and use this as a mitigating factor in determining whether discharge is appropriate.[23]

A more difficult case is where the troubled grievant is offered an Employee Assistance Program (EAP) before conduct resulted in termination but refuses management's help. Generally, an employee has less chance of getting a sympathetic ear from an arbitrator if help was offered by management but the employee rejected it.[24]

To what extent must employees cooperate with management in admitting that they have an alcohol or drug problem? In *General Telephone Co. of Illinois*,[25] Arbitrator John Sembower held that a telephone serviceman who would not admit that he was an alcoholic was not refusing to cooperate with the alcohol rehabilitation program he had agreed to attend as a condition of an earlier reinstatement. Interesting is the question posed by Sembower and the implications for an arbitrator who, as a condition to reinstatement, orders the grievant to attend Alcoholics Anonymous:

> [T]he theorem of those who work with alcoholics rehabilitation, particularly Alcoholics Anonymous, that it is an essential prerequisite to any effective treatment that a patient acknowledge that he is an alcoholic is put to the acid test. It is all very well with those individuals who voluntarily subscribe to a program such as Alcoholics Anonymous be required to acknowledge at the outset that they are alcoholics, but what of the person who, like this Grievant, is

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[23]Koven & Smith, Just Cause: The Seven Tests (San Francisco: Coloracre Publications, 1985), 216–217. *See also Veterans Admin. Medical Center*, 83 LA 51 (Denson, 1984) (under Alcohol Abuse Act employer required to provide opportunity for alcoholic employees to obtain treatment of their drinking problem before taking disciplinary action); *Greenlee Bros.*, 67 LA 847 (Wolff, 1976) (ordering conditional remedy of reinstatement and six-month leave of absence so employee can place himself in rehabilitation center); *Land O' Lakes*, 65 LA 803 (Smythe, 1975) (grievant reinstated provided he undertake treatment to cure drinking problem; failure to resolve drinking problem negates reinstatement); *Monte Mart-Grant Auto Concession*, 56 LA 738 (Jacobs, 1971) (holding discharge for just cause, but according grievant medical leave for alcohol treatment).

[24]*See* Koven & Smith, Alcohol-Related Misconduct (San Francisco: Coloracre Publications, 1984), 144–152; Loomis, *Employee Assistance Programs: Their Impact on Arbitration and Litigation of Termination Cases*, 12 (2) Emp. Rel. L.J. 275, 277 (1987): "Arbitrators are split about how to handle such situations. Some arbitrators have ruled that an employee must be reinstated, with the condition that the employee participate in an EAP. Other arbitrators have held that, once an employee has been terminated, he or she may not use the employer's rehabilitation program as a crutch to regain employment."

[25]77-2 ARB ¶8481 (Sembower, 1977).

> precipitated into such a program somewhat or wholly against his will. Must he also be required to admit that he is an alcoholic as an indicia of his "cooperation" with such rehabilitative efforts?[26]

If an arbitrator is convinced that the grievant has a reasonable chance to succeed in becoming a useful employee (the term often used is "salvageable"), a conditional remedy may be issued.[27] Reinstatement may be conditioned upon the occurrence of a future event (condition precedent). Thus, an employee may be reinstated after successfully completing a six-week alcohol abuse or EAP program. Alternatively, an arbitrator may provide for reinstatement; but, if some event or condition materializes in the future (e.g., the grievant fails to continue professional counseling), the remedy is no longer binding on management (condition subsequent). Arbitrators who issue conditional remedies must make clear the exact nature of the condition—whether a condition precedent or subsequent is being imposed.

Sometimes, an arbitrator will form a remedy with both conditions. Thus, Arbitrator Jeffrey Winton, in *General Telephone Co. of Indiana*,[28] issued the following remedy for an employee who had been accused of reporting under the influence:

> The grievant will be reinstated to his job on the day he meets the following conditions and his continued employment will be dependent on continuing them:
>
> 1. Proof of enrollment in a hospital administered alcoholism program.
>
> A. It will be either an inpatient or outpatient program as the hospital recommends and he will continue with the program until released by the hospital.
>
> 2. Weekly attendance at Alcoholics Anonymous (AA) meetings for one year.
>
> 3. Reporting to work under the influence of alcohol even if it causes very limited physical or mental impairment, shall be cause for immediate discharge.[29]

Implications for the Future

It is fair to query what the future might hold for "troubled" employees' chances in the arbitral forum, especially in those

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[26]*Id.* at 5088.

[27]For a variety of reasons, we are on record urging arbitrators to proceed with caution in drafting conditional remedies. *See* Hill & Sinicropi, Remedies in Arbitration (Washington: BNA Books, 1980), 48–50.

[28]86-1 ARB ¶8013 (Winton, 1985).

[29]*Id.* at 3057.

cases where the therapeutic or modified-corrective-discipline model is urged as a defense or as a mitigating factor in a discharge case. When attempting to speculate, one should not overlook the fact that, in general, arbitrators have not been at the forefront of social change for employees with serious personal problems, alcohol or drug dependencies, or other personal disabilities asserted as the direct cause of misconduct or unsatisfactory job performance, although arbitrators may follow legal, social, or industrial norms once the door is opened. It seems safe to conclude that as the parties adopt new policies to deal with troubled employees, arbitrators will react and formulate appropriate remedies when it is determined that there is a nexus between the employee's problem and the conduct at issue. They are, however, unlikely to plow new ground and adopt expansive policies and remedies (read therapeutic model) which have not been contemplated by the parties.

A factor of significance in this regard is the so-called "common law of the shop." From Archibald Cox and John Dunlop[30] to Harry Shulman[31] to Justice William O. Douglas[32] to the present, this phrase has been important to advocates and arbitrators. But we believe it is appropriate to reexamine the relevance of this concept, at least as it applies to troubled employees. As labor arbitration has expanded from blue-collar, private sector manufacturing to white-collar, public sector service industries, the common law of the shop is no longer a homogeneous concept. The variety of norms advocates urge arbitrators to accept or reject increases. This development may make "arbitral authority" or arbitral trends less discernible. What is arbitral authority for airlines may not be authority for steel.

It should be noted, however, that the absence of homogeneity may not be bad. In fact, it may be good. Arbitration is not for the most part a public institution. It is still a private forum owned and shaped by the parties. Thus, arbitrators should not plow

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[30]Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1116–1117 (1950): "[A] collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed."

[31]*Ford Motor Co.*, 19 LA 237 (Shulman, 1952).

[32]In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 2419 (1960), Justice Douglas declared: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."

new ground and venture blindly into areas not contemplated by the parties in their bargaining relationship. To the extent that the parties adopt and apply changes in the way troubled employees are treated, arbitrators may properly make decisions reflecting these values. To go beyond that boundary, however, is to effect a disservice to the parties' on-going relationship.

Admittedly, this is a conservative view of the arbitrator's role, but it has been the role that has made arbitration successful and a viable alternative to economic warfare. Arbitration does not exist for the benefit of arbitrators who desire to apply their own models of legal, social, or medical justice; it exists for the benefit of the parties. Although arbitrators are actors in an ongoing drama, they should never strive for top billing in providing assistance that was never contemplated by the parties themselves.

III. LIFE AFTER MISCO

R. WAYNE ESTES*

In its 1987 *Misco*[1] decision, the United States Supreme Court focused attention on the requirements for a reviewing court vacating a labor arbitration award on the basis of the award's being contrary to public policy. The Court limited this judicial action to situations in which the public policy violated is "well defined" and ascertainable by reference to "laws and legal precedents." The Supreme Court indicated that the violation of "general considerations of supposed public interests" will not suffice as a basis for vacating an award.[2]

Equally important to the Court's ruling on public policy vacation was its basic endorsement of the 1960 *Steelworkers Trilogy*

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[1]*Paperworkers v. Misco*, 484 U.S. 29, 126 LRRM 3113 (1987). For a general discussion of the impact and meaning of the *Misco* decision, *see* Wayland, Stephens & Franklin, *Misco: Its Impact on Arbitration Awards*, 39 Lab. L.J. 813 (1988); Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 Lab. Law. 683 (1988); Berlowe, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. Miami L. Rev. 767 (1988); Roebker, *Public Policy Exception to the General Rule of Judicial Deference to Labor Arbitration Awards*, 57 U. Cin. L. Rev. 819 (1988); and Dunsford, *The Judicial Doctrine of Public Policy: Misco Reviewed*, 4 Lab. Law. 669 (1988).

[2]*Paperworkers v. Misco, supra* note 1, 126 LRRM at 3119.