that relationship had ended over 14 years prior to the arbitration.[17] Where, in a lease dispute, an arbitrator failed to disclose that he had represented a company that owned 50 percent of the stock in a company that was represented by a law firm representing the lessor, there was insufficient evidence of partiality where the arbitrator was not financially involved with either the lessor or lessee.[18]

The legal principle of waiver has been applied where a timely objection was not made to the alleged partiality.[19] Union counsel had been informed that the arbitrator had previously rendered legal services in labor matters to a graphic arts firm but did not object to the integrity of the arbitrator prior to the award. The court did not reverse the award, because the union's failure to raise the issue of impartiality during the arbitration constituted a waiver of that objection.

The duty to disclose to the parties any current or past relationship before accepting an appointment is strong and positive. Any doubts should be resolved in favor of disclosure. Doing so assures the integrity of the arbitral process and the impartiality of the arbitrator.

II. Criminal Justice System in the Workplace

Elliott H. Goldstein*

Searches in the Workplace

The first issue to be discussed is the question of employment searches. These searches can be logically divided into (1) private employer searches, and (2) public employer searches. The topic may be divided further into:

1. Searches conducted by the police or policelike employees (e.g., postal inspectors) or other law-enforcement representatives.
2. Searches of workers entering or leaving employer premises.

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[17]*Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983).
[18]*Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982).
[19]*Graphic Arts Local 97-B v. Haddon Craftsmen*, 489 F. Supp. 1088 (M.D. Pa. 1979).
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3. Searches conducted on general employment premises (lockers, desks, vehicles parked on employer-owned parking lots, or work areas, such as loading docks or garbage dumpsters).

The most common issue presented to arbitrators confronted with evidence obtained from a police search is whether the admissibility of the evidence hinges on the propriety of a search under the fourth amendment. Some arbitrators have concluded that the exclusionary rule, which precludes using impermissibly seized evidence in a criminal proceeding against the victim of the improper search, should logically be applied in arbitration hearings to prevent the admission of the evidence.

In *Government Printing Office*,[1] the arbitrator concluded that a federal employee could invoke the protection of the fourth amendment and have illegally seized evidence excluded in an arbitration proceeding. In that case stolen photographic equipment was illegally seized in the grievant's apartment—his home—after a police officer and the employer's investigator awakened the grievant and gained admission to his apartment by telling him that they wanted to talk to him about a burglary in the neighborhood. The arbitrator noted in this case that not only was the police officer acting so as to abridge the defendant's rights, but also the government-employed investigator was a precipitating cause and really instigated the improper and warrantless search. Because a public employer was involved, the fourth amendment applied. Additionally, the search occurred at the grievant's home. Under those specific facts Arbitrator William Feldesman held that the "exclusionary rule precludes the use of evidence, so obtained, in a discharge proceedings, of a criminal hue,"[2] instigated against the grievant by his public employer.

In a private sector case, *Hennis Freight Lines*,[3] some employees were charged with theft and possession of cartons of clothing belonging to the employer. The criminal case was dismissed after a motion to suppress the evidence (the clothing found by the police) was allowed. The employees were fired after the bonding company canceled the bonds of two grievants allegedly involved in the thefts. Arbitrator John P. McGury noted:

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[1]82 LA 57 (Feldesman, 1983).
[2]*Id.* at 71.
[3]44 LA 711 (McGury, 1964).

> It may be argued that the spirit of the Constitutional prohibition against unreasonable search and seizure is violated, when the fruits of what has been judicially determined to be an illegal arrest . . . are nevertheless allowed to be considered by the Company or an arbitrator for discharge.[4]

However, McGury credited the evidence which had been suppressed in the criminal case. His reason for admitting and relying on this evidence took into account the difference between constitutional law/criminal law standards and the obligation of the employer under the contract to terminate for just cause. He stated that "constitutional principles may keep the grievants out of jail but do they guarantee them their jobs in the face of Company knowledge of extremely strong proof of dishonesty involving Company property?"[5]

Searches of Workers Entering or Leaving Company Premises

Arbitrators generally acknowledge the right of employers to perform reasonable searches of employees and their belongings as they enter or leave the work premises. The security procedure must be one that is (1) clearly established, (2) fairly administered, and (3) understood by all workers. Can a reasonable distinction be made between a lunch-box search and a search of purses of employees entering and exiting the plant? I think not. One arbitrator agreed with that logic and sustained the discharge of an employee who refused to allow the search of her purse under a "lunch pail" rule.[6]

Searches Conducted on General Employment Premises

The right of management to carry out employment searches under certain circumstances at the workplace is generally acknowledged. The employees should be fully informed of their obligation under security rules. Employers commonly condition the use of lockers on the right to inspect their contents at any time. Even where that right has not been reserved, many arbitrators permit a locker search upon reasonable cause or, if

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[4] *Id.* at 713.
[5] *Id.*
[6] *See Thrifty Drug Store*, 64 LA 997 (Feldman, 1975).

the practice exists, a random search or "shakedown" of all or some of the lockers at a place of work.

In *General Electric Co.*,[7] Arbitrator Eleanor S. McDonald acted on the view that past practice and employee expectations should determine the propriety of locker searches: "[I]f employee lockers have not been considered private and personal property of the employees involved and if employees have not reasonably expected the lockers to be inviolate, then a search of an employee locker" is not improper, but a search is improper "if employees at a plant have long believed and relied upon the circumstance that their lockers were considered private areas and that these could not be opened without the personal consent of the owner of the locker."[8]

Vehicles Parked on the Parking Lot

In *Shell Oil Co.*,[9] Arbitrator Charles R. Milentz upheld the dismissal of an employee for refusing an order to permit the search of a car after marijuana "roaches" were seen in an ashtray and on a dashboard. However, in *Kerr-McGee Chemical Corp.*,[10] Arbitrator William Levin found that an employer finding cocaine in the grievant's van on the company parking lot during a search was motivated by anonymous informers' suggestions that drugs would be found there. The employer discharged the grievant when he also tested positive for cocaine use. However, the arbitrator held that the employer failed to show it had reasonable grounds to believe the informers; thus, it had no reasonable cause for search, and the employee's drug test, as well as the finding of "drug paraphernalia" in the van, were not admitted for consideration on the merits.

Searches of the Person Permitted Where There is Reasonable Cause

In *Sahara Coal Co.*,[11] coal miners who were suspected of smoking in an underground mine in violation of federal and state laws and of company rules, and who refused to be searched for

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[7] 72 LA 391 (McDonald, 1979).
[8] *Id.* at 397, 398.
[9] 84 LA 562 (Milentz, 1985).
[10] 90 LA 55 (Levin, 1987).
[11] 89 LA 1257 (O'Grady, 1987).

cigarettes, were found to be improperly discharged, based on the severity of penalty and mitigation. However, the arbitrator found that it was the employer's right and obligation to "search employees when it has cause to believe that smoking underground is taking place." The arbitrator concluded that the significance of the employees' refusal to submit to the search was not reasonable cause for demanding that they undergo a drug test.

Surreptitious Surveillance

In an effort to discover and deter internal theft or drug use, distribution, and sales, employers are using more efficient and intrusive surveillance techniques. Generally, arbitrators permit employers covertly to observe and overhear the activities of employees in production areas, stockrooms, loading zones, and similar locations but areas such as lavatories, employee lounges, and locker rooms are expected to be private. As a result, a few arbitrators have concluded that an unreasonable intrusion into privacy has occurred. Federal laws forbidding wiretapping may have substantial impact in this connection, although some arbitrators have admitted illegally obtained tape recordings or videotapes[12] based on the same reasoning that permits admission of illegal searches and seizure evidence.

Use of Undercover Informants, Employee Informers and Spotters

Two recent cases have dealt with the issue of the use of undercover agents where drug problems are involved. In *Burger Iron Co.*,[13] Arbitrator Harry Dworkin concluded that an employer who used undercover agents to investigate a "drug problem" reportedly existing at its plant had just cause to discharge five employees who were observed using, possessing, or selling drugs on company premises. The union argued that enlightened employers use drug treatment programs rather than discipline to deal with employees addicted to drug use. However, Dworkin found no evidence that these employees were addicted to drugs or had voluntarily participated in an

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[12] *See Hennis Freightlines, supra* note 3.
[13] 92 LA 1100 (Dworkin, 1989).

employee assistance program (EAP). He concluded that the use of drug treatment programs does not deprive management of its contractual right to discipline for just cause.

With reference to the undercover agent issue, Dworkin found that the company was within its rights, even under a duty, to use undercover agents to investigate a drug problem in its plant, where the city police department reported that it had received information from various sources that the problem existed. Dworkin reasoned that drug dealing is furtive and done in secret, and employees rarely come forward to give evidence. The agent's written reports were verified by other information and were substantiated by guilty pleas in criminal court by three of the employees. The agent was not given names of any suspected employee by the company before he "went under cover" nor was he instructed to direct his attention to any designated individual. Under these circumstances Dworkin concluded that use of the information gained by the undercover agent was admissible and determinative of the merits of the case.

Interrogations

There is a fundamental obligation of employees to answer employer questions when an employer is engaged in a reasonable investigation of the possible commission of a crime. This duty is created by the employment relationship itself. There are clear limitations on employer interrogation, however, including prohibitions against coercive questioning under the National Labor Relations Act, the protections of the *Weingarten* doctrine,[14] and specific rights of employees to representation during questioning which may exist in the contract.

Under *Weingarten* an employee's right to union representation during an investigatory interview by management arises only if employees request representation. Further, they must reasonably believe that the investigation will result in disciplinary action. Although it is clear that the right to representation applies where employees reasonably fear adverse disciplinary action, *Weingarten* has been found not to cover situations where the employer is investigating an occurrence without contemplating discipline.

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[14]*NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975).

For example, in *Pacific Bell,*[15] Arbitrator Herbert Oestreich concluded that an employee's refusal to discuss a performance matter with a supervisor in the absence of union representation did not constitute insubordination subject to discipline, where the employee had reasonable cause to believe that the discussion was an investigatory interview to administer discipline, where the employee had requested union representation, and where the contract management handbook made the presence of a union representative at disciplinary discussions mandatory if an employee so requested.

Another issue involving *Weingarten* is the question of what to do when the request to have a union representative has not been respected. In *Trailways,*[16] Arbitrator Timothy J. Heinsz found that an employer improperly discharged employees who refused to take a breath test, despite suspicion that they were under the influence of alcohol. Heinsz concluded that management had denied to an employee the presence of a union steward during the investigatory interview. The arbitrator found that the employer might have reasonably required the employees to take the breath test under the circumstances of the case, but the presence of a steward would have resolved any questions regarding grievant's condition. Because the grievant refused to take the test, and one basis might have been the lack of representation by a steward, Heinsz reinstated grievant without back pay.[17] Heinsz reasoned that arbitrators have refused to sustain terminations where management has denied employees the right to have present a union steward when required and this could have influenced the outcome of the event.[18]

In another case dealing with the right to have a representative at an interrogation,[19] the arbitrator found that a lack of union representation during the investigation and pretermination hearing for employees whose random drug test results were positive did not invalidate the testing program under the particular circumstances. Arbitrator Barry J. Baroni stated that "representation is strongly recommended to improve the neutrality of the procedure." He noted that one of three "neutral" personnel service managers was assigned to the "test positive" employ-

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[15]92 LA 127 (Oestreich, 1989).
[16]88 LA 941 (Heinsz, 1987).
[17]*Id.* at 947.
[18]*See also General Tel. Co. of Cal.,* 78 LA 793 (Roberts, 1982).
[19]*Dow Chem. Co.,* 91 LA 1385 (Baroni, 1989).

ees, gathered evidence, including asking employees personal questions about their lifestyle, and represented the employees before a management board that included the two remaining personnel managers. Under these facts Baroni was not willing to conclude that the lack of a steward was "outcome determinative," as had Heinsz and Roberts in the prior two cases.[20]

Conclusion

In sum, the general rule with reference to the exclusion of evidence in arbitration even when criminal charges are involved is that absolute exclusion is to be avoided. With reference to searches, use of informers, surveillance, and similar techniques, the rule must be to balance the important right of employee privacy and the requirement that the employer act reasonably in line with its genuine need to protect property and to avoid or control theft, drug use, and other serious quasi-criminal misconduct in the workplace. Under these circumstances the standard must focus on the reasonableness of the action, balanced against the intrusion into the employee's privacy. "'Reasonableness,' in turn, requires some showing that the employer had good cause to suspect illegal activity on the part of the employee," or that it had a general and well-publicized rule articulating a fairly administered program of searches and interrogation.[21] The analysis under a balance of interests rule is likely to produce more acceptable results than a continued attempt at a flawed analogy to the exclusionary rules of evidence developed for the courts and never contemplated for use in the workplace to test admissibility or weight of proffered evidence.

III. OPINIONS AND AWARDS: INADVERTENT RESULTS

CHARLOTTE GOLD*

It is not easy pleasing the parties. Sometimes they complain that we say too little, other times that we say too much. One

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[20] *Trailways, supra* note 16; *General Tel. Co. of Cal., supra* note 18.

[21] Hill and Sinicropi, Evidence in Arbitration, 2nd ed. (Washington: BNA Books, 1987), 253. For similar balance where there is need to reconcile the interests of employees and property rights of management, *see Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 98 LRRM 2727 (1978); *Republic Aviation Co. v. NLRB*, 324 U.S. 793, 16 LRRM 620 (1945); *Peyton Packing Co.*, 49 NLRB 828, 12 LRRM 183 (1943).

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