

CHAPTER 4

SUBSTANCE ABUSE: THE PROBLEM THAT WON'T GO AWAY

I. A LABOR PERSPECTIVE

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Labor unions and employees they represent are alarmed that the number of cases arising from substance abuse, both in the public and private employment sectors, has been increasing in dramatic proportions. To stem the tide of drug use, employers are increasingly resorting to drug testing to detect the presence of prohibited substances in employees. Some employers have instituted random testing, some have limited testing to probable cause situations, and some have consciously refused to test at all.

Institutionally, unions abhor drug use in the workplace and oppose such practices. Nevertheless, they have been compelled to speak out against the abuses that have occurred as a result of employer overreaction in their zeal to eliminate the problem. The phenomenon of substance abuse in the workplace has spawned new businesses. The drug testing industry is flourishing, as is its counterpart, the marketing and merchandising of drug-free urine. And surely you cannot overlook the seminar industry, which has deluged us with conferences on substance abuse.

The President's Commission on Organized Crime has recommended that with very few exceptions all federal government employees be tested for drug use.¹ In response to that and other proposals, the government has published elaborate and unquestionably intrusive guidelines for drug testing.² As soon as they were published, these guidelines came under legal scrutiny.

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¹New York Times, 23 (Aug. 20, 1986).

²See *Drug Testing Guidelines*, 595:751 et seq., Individual Employment Rights Manual (BNA).

Considering the numerous recent decisions of the federal courts that have grappled with the issue, some modification is likely. Recently the Attorney General of the United States was quoted as favoring mandatory drug testing for the nation's public school teachers.³ Since many of the members of this august body of arbitrators are also academicians, and thus potentially "within the class" generally suspected by the Attorney General, you may have more than a passing interest in the outcome of this proposal.

In the private sector, the constitutional protection against unreasonable search and seizure and the right-of-privacy argument are generally not directly available; thus, the issue of the employer's right to conduct drug testing versus the worker's expectation of privacy must be contested on somewhat narrower grounds.

Drug-testing programs are multiplying rapidly in private industry, including professional sports. It is estimated that at least 25 percent of the Fortune 500 companies have already instituted some form of drug testing and that this figure will increase to over 50 percent within a year.⁴ Drug testing itself has become big business with the rapid expansion of existing companies and proliferation of new test laboratories. This burgeoning increase in drug-testing laboratories has, not unexpectedly, caused considerable concern over the accuracy of test results and the qualifications of those technicians who actually perform the tests. There is little, if any, mandatory government regulation of this industry.

In response to the increasing threat of drug testing, some enterprising concerns are marketing specimens in dehydrated form that contain drug-free urine, along with guidelines, presumably to enable the individual to "foil the 'urine police.'"⁵ Among these suggestions that may be of more than passing interest to those in this audience who may be within the putative class of suspected teacher-drug users are the following admonitions:

1. Never give your first urine of the morning. It is the most concentrated and will yield the worst results.
2. Switch your urine for a quality sample, which can be stored in urostomy or saline bags or in condoms, and can be conveniently stored in your underwear.

³Atlanta Constitution (Feb. 27, 1987).

⁴Weinstein, *Drug Tests: Privacy Versus Job Rights*, Los Angeles Times (Oct. 26, 1986).

⁵Excerpted from *Success in Urine Testing*, a pamphlet published by Byrd Laboratories, Austin, Texas, noted in *Harpers Magazine*, 26 (Mar. 1987).

3. Take care to insure that the sample is warm, lest a vigilant observer detect a cool specimen (how one accomplishes this was not explained).

4. If all else fails, assert the "blushing kidney syndrome," i.e., a psychological incapability of urinating in front of other people.

My comments here will focus on the areas that I believe arbitrators are most frequently confronted with. Since the majority of arbitrators are called upon to decide issues in the private rather than the public sector, for the most part my comments will address cases involving substance abuse issues in this arena. It is interesting to note, however, that, because of the availability of constitutional arguments to labor organizations and individuals in public employment, challenges to drug-testing programs have met with much more success in the public sector than in private employment. Whether these constitutional restraints imposed by federal and state courts will pass Supreme Court muster is, of course, an open question. Whether the limitations on a public employer's right to conduct testing are effectively transferred to the private sector is another question, and one not easily answered.

Public Sector Restraints on Drug Testing— A Brief Overview

It is settled law that public employees enjoy constitutional protections in the workplace.⁶ This includes both procedural and substantive due process. Where drug testing could result in discipline of a public employee, some form of notice and hearing is required to satisfy minimum due-process standards.⁷ The central focus of dispute, however, has been whether under the Fourth Amendment's proscription against unreasonable searches and seizures a public employer's imposition of drug tests is permissible. It is clear that urine testing is a search and seizure under this Amendment, and the inquiry has focused on the reasonableness of the intrusion.⁸ Authorities suggest that except for industries such as thoroughbred racing,⁹ that are

⁶*Mancusi v. De Forte*, 392 U.S. 364, 68 LRRM 2449 (1968); *O'Connor v. Ortega*, ___ U.S. ___, 55 USLW 4405 (1987).

⁷*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 118 LRRM 3041 (1985).

⁸*Transit Union Div. 241 v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

⁹*Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, ___ U.S. ___, 55 USLW 3392 (1986).

“pervasively” regulated, or where domestic or national security is involved, as with prison guards,¹⁰ or military or paramilitary personnel,¹¹ random drug testing is not permissible. Courts have authorized drug tests only where there is “individualized, reasonable suspicion.”¹² A federal district court declared unconstitutional a drug-testing program for applicants to and promotions within the U.S. Customs Service, holding that the testing constituted a warrantless search and seizure made in the total absence of probable cause or reasonable suspicion. On appeal this ruling was substantially modified.¹³

Recently a federal district court held that subjecting a school bus attendant to urine testing without “particularized reason to believe that plaintiff used, possessed, or was under the influence of drugs” was constitutionally impermissible.¹⁴

In another case involving public school employees, a New York court invalidated a requirement that probationary teachers eligible for tenure submit to urinalysis, noting that there must be some degree of suspicion before the “dignity and privacy of a teacher is compromised” by submission to a drug test.¹⁵ Interestingly, and the Attorney General’s opinion to the contrary notwithstanding, the court noted in this case that “teaching is *not* a profession which has traditionally been considered pervasively regulated.”¹⁶

Just last month, the U.S. Supreme Court ruled in *O’Connor v. Ortega*¹⁷ that the appropriate standard for determining the validity of a search of a public employee’s desk, whether for noninvestigatory work-related purposes or because of suspicion of work misconduct, is that of reasonableness. By a 5 to 4 vote in which the newest Court member, Justice Antonin Scalia, concurred separately (thus providing no majority opinion), the Court rejected the employee’s argument urging that the employer be required to obtain a search warrant or, at least, to

¹⁰*Seeling v. McMickens*, 501 N.Y.S.2d 679 (App. Div. 1986).

¹¹*Committee v. Callaway*, 518 F.2d 466 (D.C. Cir. 1976).

¹²*Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *Capua v. Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *Caruso v. Ward*, 506 N.Y.S.2d 789 (1986).

¹³*Treasury Employees v. Von Raab*, C.A. No. 86-3522 (E.D. La. 1986), *modified*, ___ F.2d ___, 2 Individual Employment Rights 15 (1987).

¹⁴*Jones v. McKenzie*, 628 F. Supp. 1500, 121 LRRM 2901 (D.D.C. 1986).

¹⁵*Patchogue-Medford Congress of Teachers v. Board of Educ.*, 505 N.Y.S.2d 888, 1 Individual Employment Rights 1315 (App. Div. 1986).

¹⁶A very timely survey on drug testing of public school employees and students by Zirkel and Kilcoyne is soon to be published in West Education Law Reporter.

¹⁷*Supra* note 6.

possess probable cause for conducting such a work-location search. Justice Sandra O'Connor, who authored the plurality opinion, stated that "operational realities of the workplace may make some public employees' expectations of privacy unreasonable when intrusion is by a supervisor rather than by law-enforcement officials."

The standard of reasonableness is, of course, considerably easier to satisfy than one of probable cause. Critics of this opinion will undoubtedly assert that public employee constitutional safeguards have been indeed eroded, just as the strongly worded dissent argued.

How the Supreme Court will decide these vexing public sector employment law tensions caused by the phenomenon of substance abuse is difficult to foresee. Given the Court majority's jurisprudential leanings, however, one would not expect expansive rulings in work-related constitutional issues. One can always hope, however.

The scope of an employee's expectation of privacy, in either the public or private sector, is a question that will be in sharp focus as a result of the substance-abuse issue, and arbitrators will undoubtedly be hearing more disputes on this point. There is a bill before Congress backed by the Communications Workers of America to prohibit electronic monitoring of employees unless an audible beep is utilized to warn parties to the call. The principal sponsor of the bill (H.R. 1950), Representative Edwards of California, equates such monitoring of employees with drug and polygraph testing as intrusions of employee privacy, stating that the civil liberties issue of the 1980s and 1990s is privacy in the workplace.¹⁸

Private Sector Substance-Abuse Issues

In the private sector, the collective bargaining agreement, generally speaking, constitutes the "law of the shop." Without revisiting the much debated question of whether an arbitrator should consider and apply applicable external statutes,¹⁹ it is fair

¹⁸1987 Daily Lab. Rep. (BNA) No. 66:A-8.

¹⁹Murphy, *Arbitration of Discrimination Grievances*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980); Meltzer, *The Parties' Process and the Public's Purposes*, in *Arbitration—1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers (Washington: BNA Books, 1976).

to say that an arbitrator generally does consider the external legal and statutory implications involved in substance-abuse cases. Whether these considerations are directly relied upon in fashioning the award depends on the facts of each case. Indeed, it is essential that arbitrators be aware of statutory issues in deciding drug-related issues under employment contracts.

Unilateral Institution of Drug-Testing Rules

Under the National Labor Relations Act, work rules which affect terms and conditions of employment constitute mandatory subjects of bargaining, and an employer whose employees are represented by a union may not institute work rules without negotiation over such rules. Where there has been no waiver of the right to bargain over work rules, and/or a long history of mutual negotiation and agreement prior to the institution of work rules, it is a violation of Section 8(a)(5) of the Act for an employer unilaterally to institute work rules affecting wages, hours, and other conditions of employment. Where a mandatory subject of bargaining is not specifically referenced in the collective bargaining agreement, an employer must bargain in good faith to impasse with the union; if no agreement is reached, the employer may unilaterally institute its proposal.²⁰ A complaint that the employer has violated the Act by unilaterally changing or implementing work rules is sometimes deferred or "Collyerized" by the Board to arbitration, provided both parties consent thereto.²¹ Consistent with these principles, arbitrators have held that an employer violated the agreement by making midterm modification of existing work rules.²²

The NLRB has held that physical examinations are a mandatory subject of bargaining²³ and that institution of a rule requiring polygraph examination, including questions which focus on drug and alcohol consumption, is a violation of the Act.²⁴

²⁰*NLRB v. Acme Indus. Co.*, 385 U.S. 432, 64 LRRM 2069 (1967).

²¹*Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

²²*Cf. Keebler Baking Co.*, 75 LA 975 (Morris, 1980) where the arbitrator found that the company violated its duty to bargain and the collective bargaining agreement by unilaterally changing work rules regarding absenteeism, ignoring a long history of mutual negotiation re same. *See also Rohr Indus.*, 79 LA 900, 904 (Richman, 1982).

²³*Leroy Mach. Co.*, 147 NLRB 1431 (1964).

²⁴*Medicenter, Mid-South Hosp.*, 221 NLRB 670, 90 LRRM 1576 (1975); *see also NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 63 LRRM 2552 (5th Cir. 1966) (unilateral institution of mental examinations held to violate the duty to bargain).

Thus, while advocates representing labor unions are reluctant to predict what the current Board members will decide, drug testing should be considered a mandatory subject of bargaining on the basis of past holdings concerning related work rules.

In two recent awards, arbitrators have held that the employer's unilateral institution of drug rules violated the existing collective bargaining agreement, asserting that the drug-test procedures shift the burden of establishing just cause to the employee.

In *Boise Cascade Corp.*,²⁵ the arbitrator stated:

To require the employee to take a test relative to alcohol or drug use or be suspended or discharged is requiring the employee to prove his innocence before the employer decides to assess a penalty.

Similarly, in *Bay Area Rapid Transit*,²⁶ unilaterally instituted drug-testing rules were invalidated because they were determined to be unfair and inequitable, in that the rules subjected employees to insubordination charges for refusing the test, vested total discretion in the employer to dictate the method of testing even though several tests were available, failed to provide employees with access to a portion of their sample for independent testing, and failed to include verification testing.

In a well publicized award, Arbitrator Tom Roberts held that the Major League Baseball Owners' Committee violated its agreement with the Players Association by unilaterally altering existing negotiated rules for drug testing.²⁷

Drug-Screening Techniques

Among the several drug tests on the market, urine testing is the most common. Of these, the Enzyme Multiplied Immunoassay Technique (EMIT) test is the most frequently used. It is a qualitative technique that attempts to measure the presence of drug antibodies in human urine. The test does not measure the actual presence of marijuana or other drugs in urine, however. It detects the major metabolites, which are derivatives of metabolic changes in the human body. Once they are ingested, the body's digestive system begins to attack these substances and convert or metabolize them, resulting in chemical changes in the urine.

²⁵Unpublished (Kagel, 1987).

²⁶88 LA 1 (Concepcion, 1986).

²⁷Washington Post (July 31, 1986).

It is important to remember that even supposed state-of-the-art testing, such as gas chromatography/mass spectrometry (GC/MS) techniques, which are generally used as confirmation tests, cannot determine whether a positive test reading correlates with behavior. Thus, urine testing cannot "be used to illuminate issues of impairment or intoxication." It has been suggested by a medical expert in the field that because of the endless variances of production of metabolites and urine flow in individuals, "it is likely that urine levels of inactive drug metabolites can never be used to comment tellingly on whether the subject was drug-influenced when the sample was collected."²⁸ Additionally, the wide variation in the time that drug metabolites remain in the urine must be considered when assessing the drug-test result. Heroin and cocaine may remain in the system for only one to three days, while marijuana and other drugs may remain for weeks or even months.

As the volume of drug screening increases, so is the likelihood of laboratory, or chain of custody, errors likely to increase. According to one observer, the performance of even the best toxicology laboratories on urine drug testing is grossly defective, with frequent false-positive and false-negative results and misidentifications.²⁹ When the Center for Communicable Diseases conducted a voluntary quality control program by mailing to testing laboratories samples of urine in which known drugs were placed, the error rate ranged between 11 and 100 percent.

The problem of cross-reactivity of drugs can cause screening tests to show positive from an illegal substance when, in fact, another substance is present. And since quantitative measurements on GC/MS test results are reported in nanograms per milliliter (1 nanogram per milliliter = 1 billionth of a gram), one must understandably be cautious about accepting the results at face value, given all the human and technological opportunities for error, and, more importantly, about leaping to conclusions on the question of impairment or fitness for duty.

Specific Issues in Arbitration

On-Duty Activities—Random Testing. Generally speaking, a work rule prohibiting substance abuse on the employer's premises will be upheld if it is fair, clearly communicated, consistently

²⁸16(4) J. Psychoactive Drugs, Oct.–Dec. (1984).

²⁹Morgan, *Urine Testing for Abused Drugs: Technology and the Real World* (BNA Conference, "Alcohol and Drugs: Issues in the Workplace," 1984); Lundberg, *Urine Drug Testing: Chemical McCarthyism*, 287 *New England J. Medicine* 923-24 (1972).

enforced, and not inconsistent with the collective bargaining agreement.³⁰ In *Gem City Chemicals, Inc.*,³¹ the arbitrator found that random drug testing was an unreasonable intrusion on privacy and lacked industrial due process:

Lacking such probable cause to suspect a particular individual, forcing them to take such a test is an invasion of privacy and unwarranted requirement to furnish confidential medical information. In essence, it is requiring the employee to incriminate himself without probable cause.³²

In two cases in the utilities industry, arbitrators recently held that random testing was unreasonable, constituted an invasion of privacy, and offended notions of due process.³³ An accident³⁴ or suspicious conduct³⁵ has, however, been considered a sufficient basis for searching an employee's possessions or locker, or for requiring a drug test. The element of safety is often considered in determining whether individualized suspicion is justified.³⁶ Given the frequency with which the courts have struck down random testing, the imposition of such drug-screening techniques may be of limited application.

Refusal to Submit to Drug Tests. There seems to be no clearly defined consensus of arbitral decisions in this area. Where there is scant evidence of a reasonable basis for insisting on such a test, i.e., a lack of probable cause, arbitrators have set aside disciplinary actions based on alleged insubordination.³⁷ But where there is discernible suspicion of employee wrongdoing and the employee is warned of the consequences of refusal, disciplinary action has been upheld.³⁸

In another recent case, the arbitrator held that discharge was too severe where the employee refused to submit to a drug test, and reduced the penalty to a written warning.³⁹ But, where an employee had repeatedly refused to sign a form acknowledging

³⁰Elkouri and Elkouri, *How Arbitration Works*, 4th ed. (Washington: BNA Books 1985), 553.

³¹86 LA 1023 (Warns, 1987).

³²*Id.* at 1025.

³³*Metropolitan Edison Co.*, AAA No. 14-300-0938 (Aarons, 1986); *Potomac Elec. Power Co.* (unpublished) (Zumas, 1986).

³⁴*Springfield Mass Transit Dist.*, 80 LA 193 (Guenther, 1983).

³⁵*Kraft, Inc.*, 82 LA 360 (Denson, 1984).

³⁶*Birmingham Jefferson County Transit Auth.*, 84 LA 1272 (Statham, 1985).

³⁷*Texas Utils. Generating Co.*, 82 LA 6 (Edes, 1983); *Signal Delivery Serv.*, 86 LA 75 (Wies, 1985).

³⁸*Shell Oil Co.*, 81 LA 1205, (Brisco, 1983).

³⁹*Crown Zellerbach Corp.*, 87 LA 1145 (S. Cohen, 1987).

the employer's drug policy, which included testing, discharge of a tractor-trailer driver was upheld.⁴⁰ In his award, the arbitrator noted the prior warnings, lack of justification for refusal to submit to the policy, and the fact that the union declined to challenge the policy.

Discipline Following Positive Test Results. In the absence of strong contract language, few cases have been found upholding discharge where the presence of prohibited substances in an employee was based solely on positive test results. Thus, in two different cases, Arbitrator Jack Clarke held that discharge was excessive, even though urine tests did detect the presence of marijuana and other controlled substances.⁴¹ Underlying the arbitrator's holding in both cases was the absence of any credible evidence that the employees were under the influence of the drugs at the time of testing or exhibited any behavior indicative of impairment. In an unpublished award, Arbitrator Richard Bloch held that discharge was without just cause despite the presence of drug traces in an employee who admittedly had consumed drugs the evening before he reported to work. Where the company rule prohibited "sale, purchase, use or possession of illegal drugs on company premises," the arbitrator observed:

But demonstration of the drug-related misconduct and disability—of being "under the influence"—is essential in sustaining the burden or proving just cause under Article 28. *It is not enough merely to show that an employee, even one guilty of some misconduct, had at some previous time utilized drugs.* Contrary to the suggestion of a company witness, the employee reporting for work who, for some reason, is found to have traces of drugs in his system, is not thereby guilty of use under the rule at issue. *There must be a clear showing of a casual connection.* At some point, however, the proximity of the drug use and on-the-job-misconduct will lead to the unavoidable conclusion that they are related. But the mere existence of drug traces will not compel that conclusion. Each case must be carefully evaluated on its own facts. (Emphasis added.)⁴²

In a similar case, where the employee's admitted off-duty use of marijuana late the night before reporting to work resulted in a positive test for drugs, the arbitrator upheld discipline based on testimony by the company physician that the employee was

⁴⁰*Concrete Pipe Prods.*, 87 LA 601 (Caraway, 1986).

⁴¹*Boone Energy*, 85 LA 233 (O'Connell, 1985); and *Georgia-Pacific Corp.*, 86 LA 411 (Clarke, 1985).

⁴²*Western Elec. Co.*, (unpublished) (R. Bloch, 1982).

“fidgety, nervous and apprehensive upon examination and his pupils were sluggish to react to light.” The arbitrator concluded that the company had made a demonstrable showing that the employee was under the influence.⁴³

Considerations concerning public safety justified the discharge of a bus driver where a positive drug test was confirmed by back-up testing in a case involving a transit authority.⁴⁴ While recognizing that positive GC/MS tests could not determine the exact time of ingestion or whether impairment existed, the arbitrator held that such tests did warrant the probability that there was impairment at the time of testing.⁴⁵

What appears to emerge as a somewhat consistent thread in such cases is a reluctance on the part of arbitrators to give controlling significance to the results of drug tests alone regardless of their technological sophistication. Conversely, where positive test results are corroborated by bizarre behavior or direct evidence of impairment obtained through more traditional methods, disciplinary action is more likely to be upheld.

On-Duty Possession, Use, or Sale of Drugs. Without question, an employer may discipline employees for possession, use, or sale of prohibited substances provided its work rules are clear, consistently enforced, and not in conflict with the bargaining agreement. The proofs required to support disciplinary action in such instances are not decidedly different from those employed in any other discipline cases.⁴⁶ Recent awards have focused on what constitutes possession,⁴⁷ whether the possession is “on duty,” i.e., the substance is found in a car on a company parking lot or at a company picnic or recreation facilities,⁴⁸ and whether the employee knew or reasonably should have known of the presence of the substances on person or property.⁴⁹ The employer’s proof in substance-abuse cases is sometimes developed through the use of undercover agents, and often their

⁴³*AT&T Communications* (unpublished) (Carey, 1987).

⁴⁴*Washington Metropolitan Area Transit Auth.*, 82 LA 150 (Bernhardt, 1987).

⁴⁵*Potomac Elec. Power Co.* (unpublished) (Zumas, 1986).

⁴⁶*Walker Mfg. Co.*, 81 LA 1169 (Morgan, 1983); *Rust Eng'g Co.*, 85 LA 407 (Whyte, 1985); *Georgia-Pacific Co.*, 85 LA 542 (King, 1985).

⁴⁷*United States Aluminum Corp.*, 81 LA 174 (Darrow, 1983); *KCBS*, 72 LA 517 (Ward, 1978); *Braniff Airways*, 73 LA 304 (Hoover, 1979); *Universal Eng'g Div.*, 73 LA 868 (Gibson, 1979); *Shell Oil Corp.*, 87 LA 473 (Nicholas, 1986).

⁴⁸*Hussman Refrigerator Co.*, 82 LA 558 (Mikrut, 1984); *Livingston Export Packing Co.*, 83 LA 270 (Ives, 1984); *Nugent Sand Co.*, 71 LA 585 (Kanner, 1978).

⁴⁹*Braniff Airways* *supra* note 47; *Kenecott Copper*, 73 LA 1066 (McWhinney, 1979); *Shell Oil Corp.*, *supra* note 47.

testimony is pivotal. However, arbitrators have refused to uphold discipline based solely on an informant's testimony.⁵⁰ Discipline was upheld where undercover agents' testimony was accurate, objective, and devoid of attempted entrapment statements or gestures.⁵¹ In general, the cases suggest that the usual rules for determining credibility apply.

Public Policy Considerations—Court Review of Awards

Recently, several arbitration awards reversing discharges for use of drugs or alcohol have been challenged by employers, contending that the awards should be denied enforcement because of public policy considerations. In *Meat Cutters Local 540 v. Great Western Food Co.*,⁵² the Court of Appeals for the Fifth Circuit denied enforcement of an arbitrator's award directing the reinstatement of a truck driver who admitted, after having wrecked a company vehicle, that he had been drinking. The court held that the arbitrator's award was contrary to the "public policy of preventing people from drinking and driving," and that such policy against drinking was "embodied in case law, applicable regulations, statutory law, and pure common sense," sufficient to deny enforcement of the award. The same court, thereafter, in *Misco v. Paperworkers*,⁵³ denied enforcement of an arbitrator's award reinstating an employee who had been fired for allegedly bringing marijuana onto company premises. The arbitrator found that the grievant was apprehended sitting in another person's car on company premises in an atmosphere of marijuana smoke, and that marijuana was found in his own car on company premises. There was no direct testimony that the grievant was actually seen using marijuana.

In a somewhat caustic analysis of the nonlawyer arbitrator's analysis and following the court's rejection of key factual findings, the court applied the same public policy considerations as in *Meat Cutters* and held, over a vigorous dissent, that:

Gazing at the tree and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well founded public policy.

⁵⁰*A.R.A. Mfg. Co.*, 83 LA 580 (Canestraight, 1984).

⁵¹*Walker Mfg. Co.*, *supra* note 46.

⁵²712 F.2d 122, 114 LRRM 2001 (5th Cir. 1983).

⁵³768 F.2d 739, 120 LRRM 2119 (5th Cir. 1985), *cert. granted*, 107 S.Ct. 871 (1986).

The U.S. Supreme Court has granted certiorari on this case to examine application of what has heretofore been a very narrowly applied public policy exception to limited judicial review of arbitral awards.

The Court of Appeals for the First Circuit, in *S.D. Warren Co. v. Paperworkers Local 1069*,⁵⁴ similarly refused to enforce an award where the arbitrator set aside several discharges for use of marijuana on the job and converted the penalties to suspensions. The court's holding was premised on a finding that the arbitrator exceeded her authority by substituting a lesser discipline, when no such discretion was permissible under the agreement, and on application of what the court concluded is a "well-defined public policy against the use of drugs in the workplace." A federal district court in Hawaii reached the opposite conclusion, holding that no such well-defined public policy existed to justify refusal to enforce an award reinstating employees found using marijuana on company premises.⁵⁵

The Supreme Court's most recent application of the public policy exception to the general principle of judicial deferral to arbitration awards was in *W.R. Grace & Co. v. Rubber Workers Local 759*,⁵⁶ in which it held:

As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy. . . . If the contract as interpreted [by the arbitrator] violates some *explicit* public policy, we are obliged to refrain from enforcing it. Such a policy however *must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.* (Emphasis added.)

Until the decisions in *Meatcutters*, *Misco*, and *S.D. Warren Co.*, *supra*, reviewing courts had interpreted this exception in extremely narrow fashion and refused to apply the exception where arbitrators directed reinstatement of an employee who attacked a supervisor while suffering a nervous breakdown,⁵⁷ and of an employee found to have engaged in dishonest acts.⁵⁸ Judge Harry Edwards, speaking for the Court of Appeals for

⁵⁴815 F.2d 178, 125 LRRM 2086 (1st Cir. 1987).

⁵⁵*Big Three Indus. v. Longshoremen (ILW) Local 42*, ___ F. Supp. ___, 124 LRRM 3173 (D. Hawaii 1987).

⁵⁶461 U.S. 757, 113 LRRM 2641 (1983).

⁵⁷*E. I. DuPont de Nemours v. Grasselli Employees Indep. Ass'n of E. Chicago*, 790 F.2d 611, 122 LRRM 2217 (7th Cir. 1986).

⁵⁸*Postal Workers v. United States Postal Serv.*, 789 F.2d 1, 122 LRRM 2094 (D.C. Cir. 1986).

the District of Columbia Circuit, in rejecting the employer's public policy argument that reinstatement of a dishonest employee violated public policy, held:

The award was not itself unlawful for there is no legal proscription against a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct. In other words, even if the arbitrator's view of *Miranda* was wrong, his decision to exclude the grievant's statements did not in any manner violate the law or cause the employer to act unlawfully. In addition and most importantly, the grievance plainly raised an arbitrable issue. The Arbitrator was properly designated and authorized to hear the case and the arbitral judgment rested on an interpretation of the contract. . . .

For us to embrace the employer's argument here would be to run the risk of allowing an ill-defined "public policy" exception to swallow the rule in favor of judicial deference to arbitration. We will not endorse any such blatant disregard of the teachings of *Enterprise Wheel* and *W.R. Grace*.⁵⁹

The Court of Appeals for the Ninth Circuit recently refused to enforce an award which directed reinstatement of an employee found to have participated in a strike on the basis that the award was in direct conflict with a federal statute prohibiting employment of an individual who participated in a strike against the government.⁶⁰

Application of the public policy exception to the enforcement of arbitration awards raises serious questions concerning the role of the "designated contract reader," as the arbitrator has been described. The adoption of an arbitration clause means that the parties have agreed to employ arbitrators as the designated contract readers and have empowered them to render binding interpretations of the contract. Where construction of the agreement implicitly or explicitly requires an application of external law, the parties have necessarily bargained for the arbitrator's interpretation, and should they not be thus bound by it? In Professor Ted St. Antoine's view, since the arbitrator is the "contract reader," such interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties, who thus should be bound by the arbitrator's interpretation without regard to whether a judge

⁵⁹*Id.* at 8-9.

⁶⁰*Postal Workers v. United States Postal Serv.*, 682 F.2d 1280, 110 LRRM 2764 (9th Cir. 1982).

would reach the same result. The parties' remedy is the same whenever they are not satisfied with the arbitrator's performance. Modify the contract or hire a new arbitrator.⁶¹

Arbitrators must struggle with difficult choices in drug cases. It is naive to expect that arbitrators do not utilize external sources of law, as well as their own notions of right or wrong, in evaluating employee conduct in drug cases. The prospect of judicial rejection of arbitral awards in drug cases based on vaguely defined public policy grounds could act as a serious deterrent in fashioning an award based on extenuating circumstances which favor mitigation. While public policy considerations are for the courts to decide, most arbitrators in drug cases must necessarily consider existing laws in assessing the seriousness of the misconduct, including the nature and quantity of the drug use or possession.

Indeed, it might be said in most drug cases that arbitrators, in fashioning remedies, apply their own individual sense of fairness within the contract's parameters, which takes into account numerous objective and subjective factors favoring modification of a penalty. If there indeed exists a dominant and well defined public policy against drugs in the workplace that neither permits nor allows modification of employer discipline, the arbitral process in this area will be severely impaired. It is difficult to believe that the Supreme Court would adopt the rationale of the *Misco* and *S.D. Warren* decisions; yet clarification of the public policy exception with respect to enforcement of arbitral awards in drug-related cases is needed and, it is hoped, will enlighten arbitrators and the parties to the process.

Off-Duty Use. It is a fairly settled principle that discipline for conduct away from the employer's premises is not just cause for discharge unless the behavior harms the company's reputation or product, renders the employee unable to perform work, or leads to the refusal or inability of other employees to work with the alleged offender. In drug cases these factors may be applied in varying degrees. Recent awards have applied such criteria with inconsistent results.

⁶¹St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137 (1977), quoted in *Postal Workers v. United States Postal Serv.*, *supra* note 58, at 6-7.

Thus, in one case an arbitrator set aside discipline where the grievant pleaded guilty to selling two ounces of marijuana to an undercover agent (a former high school friend) who was visiting the grievant's residence, an act for which he received a suspended sentence. No evidence of damage to the employer's reputation or product, or inability of the grievant to perform his job, or reluctance of employees to work with grievant was presented.⁶²

Another arbitrator upheld the discharge where an off-duty sale involved one-eighth ounce of cocaine and the grievant also received a suspended sentence. This arbitrator side-stepped the usual criteria and found job-relatedness due to the grievant's admitted prior conviction for drug use, and on the "totality" of grievant's continuing abuse of drugs.⁶³ Publicity surrounding the arrest of an employee of an electric utility company appeared to be a significant factor in another award, upholding the discharge of an employee who pleaded guilty to possession of marijuana in a general drug bust.⁶⁴ Several newspaper articles covered the story, and the grievant was identified as an employee at the company. Conversely, the absence of adverse publicity was the pivotal factor in setting aside a discharge in another case involving off-duty involvement with drugs.⁶⁵

In an unpublished award, an arbitrator found no basis for the discharge of an employee working at a nuclear facility for alleged drug involvement following his arrest for possession of marijuana plants in his remote trailer residence during a manhunt for an escaped felon. Criminal charges were dismissed following a motion by grievant's attorney to suppress evidence obtained by an illegal search and seizure. Despite the highly sensitive nature of the employer's operation, the arbitrator found no relationship between the grievant's off-duty possession of the plants and work performance and declined to conclude, as urged by the employer, that the grievant exhibited character traits incompatible with holding a position in the nuclear industry.⁶⁶

In *Times Mirror Cable Television of Springfield*,⁶⁷ the arbitrator rejected the employer's "nondisciplinary" suspension without pay of an employee charged with off-duty drug trafficking, and

⁶²*Vulcan Asphalt Ref. Co.*, 78 LA 1311 (Welch, 1982).

⁶³*Martin Marietta Aerospace*, Baltimore Div. 81 LA 695 (Aronin, 1983).

⁶⁴*Alabama Power Co.*, 88 LA 425 (Preston, 1987).

⁶⁵*Virginia Elec. & Power Co.*, 87 LA 1261 (Jewett, 1984).

⁶⁶*Georgia Power Co.* (unpublished) (Florey, 1985).

⁶⁷87 LA 543 (Berns, 1986).

found that the traditional presumption of innocence until proven guilty had been unfairly juxtaposed and that the discipline was without just cause. The award directed that the grievant be reinstated with pay or, if he was not returned to work, that he be placed on paid leave of absence pending disposition of the criminal charges. Arbitrators are divided on the propriety of such interim discipline, as evidenced by an award in *Lanter Co.*,⁶⁸ where suspension pending disposition of criminal charges for off-duty drug use was upheld. The employer's good-faith investigation and grievant's subsequent guilty plea to drug trafficking, resulting in a prison sentence, justified the suspension.

The discharge of a telephone company service technician was upheld where he was arrested for off-duty possession with intent to distribute 11 ounces of marijuana and 4 tablets of LSD, where the grievant later pleaded guilty to a reduced misdemeanor charge.⁶⁹ Despite the absence of publicity or job impairment, job-relatedness of the misconduct was found because of minimal supervision of the grievant, his access to customers' homes, and daily contact with the public.

Conclusion

Arbitrators who are presented with substance-abuse cases face difficult challenges in deciding just-cause issues. The devastating effects of drug use and the government's efforts at the federal, state, and local levels to combat trafficking in prohibited substances is well documented and publicized. Efforts to combat the use of drugs must include cooperation between employers and unions through prevention, rehabilitation, and innovative use of employee assistance programs.

Given the absence of specific contract language that arbitrators frequently wrestle with, it is not surprising that the range of arbitral awards has been so extensive. The parties to the process can and should carefully set forth in their agreement the precise scope of substance-abuse rules and the extent to which EAP, counseling, and/or other rehabilitative programs are to be utilized. Then the arbitrator should carefully consider same.

⁶⁸87 LA 1300 (Thornell, 1986).

⁶⁹*South Cent. Bell*, Gr. 83-35-208W (unpublished) (Jaffee, 1984).