

CHAPTER 3

WHAT'S UP, DOC? MEDICAL CONUNDRUMS IN ARBITRATION

Medical issues frequently arise in arbitration. Cases may involve mandatory medical examinations, disabilities and the duty to accommodate, drug and alcohol testing (randomly or because of “reasonable suspicion”), sick leave justification, family medical leave, and others. In this interactive session, distinguished advocates debated four hypothetical scenarios. Experienced members of the National Academy of Arbitrators rendered their awards and provided their rationales.

- Moderator:** **Robert B. Moberly**, National Academy of Arbitrators, Fayetteville, AR and St. Augustine, FL
- Panelists:** **Arbitrator: George R. Fleischli**, National Academy of Arbitrators, Madison, WI
Arbitrator: Paula Knopf, National Academy of Arbitrators, Toronto, ON
Arbitrator: Homer C. La Rue, National Academy of Arbitrators, Columbia, MD
Union: Bill O'Brien, Miller O'Brien Cummins, Minneapolis, MN
Management: Karen G. Schanfield, Fredrikson & Byron, P.A, Minneapolis, MN
Management: Thomas R. Trachsel, Felhaber Larson Fenlon & Vogt, Minneapolis, MN
Union: Nancy A. Walker, Walker Law Office, Philadelphia, PA

Robert Moberly: George Fleischli is from Madison, Wisconsin, and is a past president of the National Academy of Arbitrators. Paula Knopf is from Toronto and is past president of the Ontario Labor & Management Arbitrators Association. Homer La Rue is a law professor at Howard University in Washington DC, and also is past president of the Association for Conflict Resolution.

The management advocates, both from Minnesota, are Karen Schanfield and Tom Trachsel. The union advocates are Nancy Walker, from Philadelphia, and Bill O'Brien from Minneapolis. I think we have an outstanding panel for you today.

Mandatory Medical Exams

The first scenario involves a required physical. A trucking company is concerned that its injury rate is more than the industry average, possibly doubling its insurance premium. To avoid such an increase, the company adopted an injury management policy requiring the use of an injury management clinic (IMC), which specializes in workplace injuries. All employees who suffer a workplace injury must see an IMC physician. Employees also can see their own physicians.

After the company adopted this policy in June 2011, the human resources manager faxed a copy to the union president. At the arbitration hearing, the manager provided accident statistics that showed a reduction in injuries and claims. The union representative, on the other hand, said that the company adopted the policy unilaterally. The union was not questioning the competence of the IMC staff; the union's concern was the mandatory requirement to use the IMC rather than just the employee's physician. The union contends that the policy is unreasonable and should be set aside.

Question: Is the company's injury management policy reasonable?

Bill O'Brien: Good morning; I represent the union. The employer here, the Overland Trucking Company, admits in this case that, without consulting with its collective bargaining partner, the union, it unilaterally imposed its mandatory medical exam policy. Under this policy, the employer requires employees who suffer workplace injury to immediately see a doctor of the company's choosing before seeing a doctor of their own choosing.

Let me count the ways in which this policy is flawed. First, the panel will find no requirement in the collective bargaining agreement that employees see a company doctor before consulting their own. Nor may an employer impose such a mandate—a new condition of employment that concerns mandatory bargaining subjects—mid contract. The employer here had every opportunity to raise its medical treatment concerns in bargaining and failed to do so. But there are more troubling implications about this policy.

The right of employees to seek and secure confidential treatment from a doctor of their choosing is embedded in applicable external law, including the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), both of which narrowly restrict an employer's discretion to require employee medical examination. Under the FMLA, for instance, employers may only secure doctor verification of an employee's serious illness, but not more, when it is necessary to verify a current request for leave. Under the ADA, employer medical inquiries must be limited to that which is necessary to determine whether an employee is able to perform the essential functions of a job with or without reasonable accommodation.

What's more, external laws, including the ADA and FMLA, require that employee medical information be maintained in strict confidence, disclosed only to those with a need to know. Overland Trucking's policy here has no limits. It offers no guidance whatsoever on the scope of the medical inquiry or the manner in which medical data will be maintained or, for that matter, to whom it will be disclosed. The policy is flawed.

The policy is also flawed from a public policy standpoint. It fundamentally interferes with the doctor-patient relationship and with an employee's right to see a doctor of his or her choosing, a doctor without divided loyalties. The company doctors here, working at the clinic that the company sends employees to, are admittedly retained by the employer for the purpose of controlling injury costs to the employer. Those doctors have divided loyalties. And are those divided loyalties disclosed to the employees? No. They may never know when the employer insists that they go to the company clinic that the interests of the doctors there are not fully aligned with their own interests.

This policy cannot stand. It has not been bargained. It is not compliant with the ADA or the FMLA. And its application creates a wholly unreasonable intrusion on the right of all employees to choose and consult, when and how they see fit, with their own medical providers. I ask, therefore, that you sustain the grievance and require the company to retract this dangerous policy.

Karen Schanfield: Good morning, panel. I'm here on behalf of Overland Trucking Company.

I'm going to ask that you deny the grievance. The union simply has not sustained its burden of proving the policy is unreasonable. Before I talk about that, let me talk for a moment about what this policy requires and what it does not require so that we're clear.

This policy is not a mandatory physical examination in all circumstances. This policy does not prohibit an employee from seeing his or her own physician. It does not require that any particular physician be seen. It does not require that an employee use this particular clinic for a non-work injury. It does not impose any additional costs on an employee. The employee is transported without charge to the clinic, and the visit is paid for. So it's a very narrowly tailored policy, and it's aimed at a very reasonable goal, which is to limit the company's costs. That is a goal that benefits not only the company but the union and the employees as well.

The test of reasonableness is whether or not there's a legitimate objective of management to which the policy is tailored. This is a very narrowly tailored policy directly intended to address a particular problem for the employer. The employer has had escalating costs related to work-related injuries. Its ratio is two to three times higher than others in the industry, and the company was threatened with a doubling of its premiums for workers' compensation carriers' coverage. That's not good for anybody. That means there's less money available not only for the company, but also for the unions and the employees.

What's interesting is that, as the policy has gone into effect, we've seen that it has controlled costs, and it has limited expenses related to injuries. That ought to be good for everyone. We ought to be very pleased that that's happening rather than saying we want to stick with the old system where employees chose their own physicians from the outset, which resulted in escalating costs.

What we also know is that, as a result of this policy, employees will see people who are trained in occupational medicine who can offer quick and expert advice. That's the information that the company will receive, not particular information about a particular individual's medical history.

Further, this policy is not inconsistent with federal law. It is not inconsistent with state workers' compensation law. And it is not inconsistent with arbitral decisions, as Mr. O'Brien has suggested. Federal law does allow limited inquiries into medical issues by employers, and this is exactly what we're doing in this particular situation. Workers' compensation laws in nearly every state allow the employer to designate the provider of health care services for the employee, and there is a long line of arbitral decisions that uphold the same thing. Arbitral decisions consistently say that an employer can designate a physician when it requires the employee to undergo a physical exam as an employment requirement. I'm

quoting particularly from Arbitrator Cohen's decision in *City of Ottumwa*.¹

So, given the reasonableness of the policy, its consistency with state, federal, and local law, and with arbitral decisions, I would ask that you deny the grievance.

Robert Moberly: Thank you. Now I will ask each arbitrator to render an award. I'll start with the lead arbitrator in this case, George Fleischli, and then ask the others about their award.

George Fleischli: I would deny the grievance. I think the policy is reasonable.

Paula Knopf: I would allow the grievance. It's not a reasonable policy.

Homer La Rue: Notwithstanding that the union's argument was heartfelt, grievance denied.

Robert Moberly: All right, George, what's your rationale?

George Fleischli: The adoption of the policy involves an exercise of management rights. The employer has a responsibility for the safety of its employees. It also has a financial obligation to compensate employees who get harmed or injured, no matter what the cause, and to provide rehabilitative services.

In the facts, I find no contractual restriction on the exercise of that right. That doesn't mean it's unlimited. But, I find no specific restriction.

The most difficult question arises out of the fact that it was adopted unilaterally. I don't know the answer to the question, but I suspect this new policy would be subject to impact bargaining but not decision bargaining. That means the employer could implement it, and the union still has the right to discuss and challenge its implementation.

There's no evidence that there were contractual procedures that were not followed. The bottom line comes down to drawing the line between enforcement of the contract and enforcement of outside law (the duty to bargain) as part of the grievance process. Ordinarily, that's a question for the labor board.

My sense is that this policy would not violate the workers compensation law in most states, but that question would need to be addressed in the decision.

The new policy is not unreasonable. The company had sound business reasons for adopting it: the injury rate was well above industry average, and the company was faced with a doubling of

¹100 LA 433 (1998).

premiums. And the employees remain free to see and be treated by their own physicians.

Paula Knopf: Very briefly, and this may be a Canadian perspective, but it's one that you Americans might want to think about.

The way Canadian arbitrators look at things is to expect that, when an employer imposes a unilateral policy on the employees, which it has the right to do, it must do so reasonably. Further, the policy has to be reasonable. This policy is not reasonable. First, it's one-size-fits-all—no matter what the injury and no matter what amount of time the employees may or may not be taking off. Second, it is a complete invasion of employees' privacy rights to require them to submit to a medical examination by someone who is not of their own choosing. There is little that could be more invasive of one's privacy than being subjected to a physical examination; without consent, it amounts to an assault. Balancing those concerns with the employer's right to manage the workplace, the policy can be seen as unreasonable and unfair. There are less invasive ways that the employer can get the information it requires. It's unreasonable to say that, by virtue of being an employee, you lose the right to a doctor of your own choosing.

Homer La Rue: I would only add a couple points to what George has said. Number one, there are no facts here that indicate how the employer is going to be using the information or whether the employer is obligated to choose the IMC examination over that of the private doctor. Had there been evidence of something like that, then the question of reasonableness might have been more difficult. But I think that, given that there was none, I agree with George's ruling.

Disabilities and Duty to Accommodate

Robert Moberly: Let's move to the super script disability problem. In this case, the Daily Planet felt change was needed because sales had declined, and the company was close to bankruptcy. The new president felt that sales associates needed uniformity in their presentations. He created a super script—a seven-page, single-spaced script that each sales associate had to memorize verbatim. He told sales people that verbatim memorization of the super script is a mandatory job requirement. Sales associates who fail to attain certification of verbatim memorization can be disciplined up to and including discharge. Managers conduct the certifications.

The union did not grieve that requirement. However, Clark Kent, a seven-year “superman” sales associate who was among the highest paid employees in this commission-driven environment, could not memorize the script no matter how hard he tried and no matter how much assistance he received. He visited his family physician to determine whether there was some medical cause for his memorization problem. His doctor, who was a personal friend, opined that the cause could be related to diabetes. He explained that some diabetics suffer memory difficulties as a result of insulin deprivation in parts of the brain. However, no testing was conducted by the doctor.

Kent notified his supervisor, Lois Lane, that he had a disability. Ms. Lane gave him a form asking him to identify the disability and to describe the requested accommodation. The company did not require any certification. Kent completed the form, described his disability as diabetes, and requested an accommodation. He asked to meet with human resources to discuss the issue.

Lane and human resources determined that memorizing the script was an essential function of his job. The only accommodation was to give him another two weeks to memorize it. Lane e-mailed the decision to Kent, who replied that this was not good enough. No additional conversations were held, and Kent was discharged.

The union grieved the matter, stating that there was no just cause and that the termination violated the nondiscrimination provisions of the collective bargaining agreement, i.e., discrimination based on disability or the perception thereof.

Question: Should the grievance be sustained? Let’s go to the company advocate in this case.

Karen Schanfield: Hello, arbitration panel. I’m here today on behalf of the Daily Planet. It’s a pleasure to argue before you once again.

The question is: Should the grievance be sustained? The answer, in my view, is no. The termination should be upheld. The employer did not violate the collective bargaining agreement. I’m expecting two arguments from the union. One will be that we violated an obligation to reasonably accommodate Mr. Kent. The second will likely be a just cause argument.

So let me start with the first one, the alleged violation of an obligation to reasonably accommodate. There is no such thing in this collective bargaining agreement. The arbitrator’s authority is confined to interpreting the contract. The contract has a

provision that says the employer shall not discriminate based on disability or perceived disability. Interestingly enough, that's not even the language of disability discrimination law. The ADA says you cannot discriminate based on perceived disability, history of disability, or current disability. So it doesn't even track in that simplest form, the ADA.

But more importantly, it doesn't track the second prong of the ADA, which is the reasonable accommodation and interactive process provision. Discrimination law basically says you cannot treat someone differently because of their protected class status, whether that's age, race, sex, national origin, gender, disability, whatever. That means do not treat someone differently. In addition, when the case involves disability under federal law and under many state laws, there's a second obligation, and that obligation is to reasonably accommodate. That means you do treat the person differently. We don't have that under this contract. The only thing that applies here is nondiscrimination based on disability or perceived disability, and there is absolutely no evidence to suggest that Mr. Kent was treated differently from any other person who could not memorize the super script. That may seem unfair. That may seem harsh. He may have remedies outside of this process. But within this process, he is confined to the language of the contract, and you, as arbitrators, are confined to interpreting the contract.

In terms of what I expect will be the union's second argument, that there was no just cause for the termination, I would say there was, in fact, ample just cause. The employer tried to work with this employee, even if we put all the discrimination laws to the side, but the employee gave up on that process. After the employer made several different efforts to assist the employee, Mr. Kent said, "No way. I won't take two more weeks. That's not going to work. I won't accept it." Well, it was the employee, not the employer, who gave up on the process. I would submit to you that, when an employee behaves in that fashion, it is well within the employer's right to discipline based on the conduct and behavior. And that is true even taking into account his excellent performance and his years of service with this company.

There is ample case law to support the termination in this case. If you'll keep your record open when we finish, I'll be happy to give you the citations to these cases.

I want to talk briefly about what the appropriate remedy is here. The remedy is not reinstatement. That would be very impractical.

He cannot do this job. So, my suggestion is that he not be reinstated. If you feel differently and you feel he tugged at your heartstrings enough that you say you have to put him back to work, I would reinstate with the condition that he memorize the super script within a reasonable period of time, which I would suggest would be four weeks, and that he receive no back pay because of his role in this episode.

Nancy Walker: Good morning. I'm here for the union today. You spent the day with Clark Kent. He was an outstanding employee, a top performer for the Daily Planet, one of their very best. Also, he is a person with a disability: he is diabetic. He was fired for a solitary reason, and that solitary reason was that he could not memorize a seven-page, single-spaced, sales script. It was an impossible task for Mr. Clark, because as a diabetic, he has short-term memory issues.

The labor agreement, federal law, and state law all prohibit discrimination based on disability. In fact, the Americans with Disabilities Act actually says "No covered entity," like the Daily Planet, "shall discriminate against a qualified individual with a disability with respect to discharge." Instead, the employer must engage in a reasonable accommodation process. The employer needs to find some kind of an accommodation that will allow the employee to perform the essential functions of the job.

Let's look at our case. We know that Mr. Kent is a qualified individual. Absolutely he is qualified. He's a top sales performer. Secondly, we know that he's a qualified individual with a disability who is entitled to an accommodation. How do we know that? They gave him an accommodation. A wholly inadequate accommodation, but they conceded that he was entitled to an accommodation.

Whether or not the accommodation is reasonable is really what you have to decide, panel. The law is clear that determining the reasonableness of an accommodation is part of an interactive process. In fact, an employer who fails to engage in an interactive process with an employee violates the law.

Here's what should have happened. Mr. Kent identified himself as person with a disability: he was diabetic. He requested a reasonable accommodation of having the ridiculously long script sitting next to him and his phone in his cubicle. The Daily Planet at that point had two options. It could have agreed that this was a reasonable accommodation and implemented it, or it was required to engage in the interactive process. It was required to ask Mr. Kent some questions about his disability, to ask him some questions about what might be a reasonable accommodation and why.

It had an obligation to do that. Instead, it made the unilateral decision that two weeks, a two-week extension on the mandatory certification, would be reasonable.

It's the union's position, wise members of the panel, that giving Mr. Kent two additional weeks to learn the super script was akin to telling someone with macular degeneration that they have two weeks to see better. It was wholly inadequate, and therefore they violated the law.

Now, what does that mean? The parties' collective bargaining agreement prohibits discrimination based on disability. We know that they violated the Americans with Disabilities Act, ergo, they violated that provision, the nondiscrimination provision of the collective bargaining agreement. Therefore, any discharge in violation of law is manifestly unjust.

So the union is going to ask you today to sustain the grievance and reinstate Mr. Kent to the position he loved with full back pay. And we're going to ask that you retain jurisdiction for the limited purposes of overseeing the implementation of the remedy in case if necessary.

Robert Moberly: Thank you, advocates. Arbitrators, should the grievance be sustained? If so, what should be the remedy?

Paula Knopf: I would allow the grievance and award full back pay.

Homer La Rue: Ditto. In addition, I would retain jurisdiction.

Paula Knopf: First of all, I would not admit and disclose that I couldn't memorize seven pages of script; nor do I suppose that any of you could either! But that doesn't factor into the decision.

Now to be serious, I would approach this case the easy way, that is, from the beginning: Did the employer have just cause for discharge? We have here a seven-year employee with high productivity. There is no evidence of inadequate sales or performance concerns; absolutely the total opposite. The reason given for discharge was that he was deemed to have failed this imposed task or that he failed to take the test. But is memory, or being able to memorize the seven-page, single-spaced script, an essential aspect or element of his work? Clearly it is not. He's a top performer without being able to do it. The employer simply hasn't met the onus of showing just cause for discharge.

That takes us to what do we do now? What's the remedy? We must reinstate him with full back pay because just cause was not established. But is he also entitled to accommodation? I'm concerned about his medical evidence, because there really isn't any.

He says he has diabetes, but there's no evidence of him being tested or that such a condition plays a factor in his inability to be able to memorize the script. So he may not even require any accommodation. So the union certainly has not met the evidentiary burden of establishing an entitlement to accommodation.

What probably needs to happen is that the grievor should sit down with the employer, as he requested, and have a discussion about his request to have the script beside him. Alternatively, the employer might want to rethink whether it is even appropriate or advantageous to have their people read seven-page scripts and hope to make a sale. But those are not really an arbitrator's concern.

Homer La Rue: I would just add that I completely concur with the ruling. The other thing that strikes me about this is that, one, an arbitrator would not necessarily have to even reach the disability law to say that the way in which the company went about attempting to accommodate was unreasonable. What did the company do? Under the facts of this case, they dictated a certain amount of time without any conversation with the grievant about what he might need. That, to me, smacks of unreasonableness and, therefore, it is sufficient to say, even under the contract language without going to the disability law, that the company has to do more than simply unilaterally dictate that this is the accommodation and this is what will work.

George Fleischli: The only thing I would add is that I'd be surprised if the company's new marketing approach works. But the new CEO is entitled to do what he wants to in order to stay out of bankruptcy. However, I think the accommodation the grievant proposed is quite reasonable.

I might retain jurisdiction, but I'd tell the company to take him back, give him back pay, and let him try his way. If his approach poses an actual problem in the future, and the company thinks it can justify his termination, that would be a new question.

I don't view this as an ADA case necessarily. I view it as a simple just cause case. A guy couldn't do it for legitimate reasons, and they should let him try it his way, especially since he's a top performer.

Paula Knopf: I just want to add one thing from the Canadian perspective. As we have told you many times, Canadian arbitrators have the jurisdiction to apply human rights law. It's very clear in our legislation and jurisprudence that collective agreements have to be applied in conformance with human rights law. So,

we don't have the jurisdictional issues or concerns that counsel for the employer so ably raised. We would take jurisdiction over the human rights issue without a blink. Further, employers and unions in Canada seem to prefer that they can have human rights issues resolved in the same forum as other issues that arise out of the collective agreement and employment relationship.

Homer La Rue: Just one last point. I think where the Canadian experience and the American experience converge is in the federal sector, where there is no such thing as external law, as a good friend of ours, Jack Clarke, has always said. It's incorporated into the agreement.

Drug Testing

Robert Moberly: Thank you to the panel. Going to problem number three, the employee who declined a drug test. A utility company employed the grievant as a lineman. He held that position throughout his career. His supervisor is Mike Henning. The grievant was required to drive large bucket trucks and hold a commercial driver's license (CDL), as is required for that sort of truck. The company uses third parties to manage its drug-testing programs. The grievant had not been tested prior to January 2009, but the contractor who performs drug screening sent the supervisor an e-mail telling him to send the grievant for testing. Henning told the grievant to take the drug test. According to Henning's testimony, the grievant said he was always chosen for any testing, it wasn't fair, and he was taking a vacation day. Henning said, "I told him he shouldn't leave. The testing was mandatory. He left anyway." Henning contacted the company's human resources department and was told that the company interpreted a refusal to take the test as a positive test result.

The company has the following drug-testing policy: For a first instance testing positive, the employee will be suspended and then evaluated, including recommended treatment. The employee must then be retested with a negative result. The refusal by an employee to cooperate may result in disciplinary action. For a second instance of testing positive within a five-year period, the employee will be terminated. So the grievant in that case was suspended and told that any future positive test within a five-year period would result in termination.

The grievant went to a counselor; took another drug test, which was negative; completed the required substance abuse program;

and returned to work. The grievant testified that, when he was told to take the drug test, he had just returned from an out-of-town assignment in which he had worked 15 straight days for 14 hours per day, that this assignment was a three-hour drive from home, that he had been treated for depression, and that he was tired, upset, and having a bad day.

Several months later, in August 2010, the grievant was severely injured on the job. He was in his bucket and the truck started to roll backward down a steep hill. He fell about 30 feet and broke his pelvis and several ribs. He was off work for several months and returned to light duty in December 2010. He had substantial medical restrictions, including no driving and no lifting. In April 2011, the grievant was sent for another random drug test, and the test came back showing positive for cocaine. The company considered this positive test to be the grievant's second positive test in a five-year period, with the first one being his refusal to be tested. The company invoked its drug-testing policy and terminated the grievant. Was the discharge justified?

Thomas Trachsel: The grievant was instructed to take a random drug test. He refused. Perhaps the employer could have drafted its policy to expressly state that the refusal to test would be treated as a positive. But the failure to craft the policy so specifically does not open the door to overturning the discharge.

First, of course, there's no evidence that the grievant, who was insubordinate and failed to follow "obey now, grieve later," was given assurances that refusing a test would be treated differently from a positive. More importantly, after the grievant refused to take the test, the employer treated that refusal just as if it were a positive test, and the union never grieved over that.

When the grievant was suspended, he was specifically told that any future positive tests within a five-year period would result in termination. The policy says a second positive test within five years results in termination. So, it was plain that the refusal to take a test was treated just like a positive.

Also, after the grievant refused the test, he had to see a counselor, pass a drug test, and complete a substance abuse program before returning to work. These are the steps that someone goes through after a positive test.

In fact, under U.S. Department of Transportation (DOT) regulations, when a driver with a CDL in a safety-sensitive position tests positive or refuses to take a test, the employee is removed from the safety-sensitive functions and isn't permitted to return until

going through the steps of evaluation, completion of a program, and a negative test result. The regulations required the employer to treat the refusal to test as a positive.

In any case, the union's failure to grieve must be deemed as the union accepting that that's how the company treated the refusal to test—as a positive.

Just more than two years later, the grievant tested positive for cocaine. Pursuant to the express policy and the warning that he was given, the employer discharged him from employment, and the employer had just cause to do that.

The union is going to point out that, when the grievant tested positive for cocaine, he was actually on light duty with restrictions that included no driving and no lifting. The union is going to try to argue that, because of that, he shouldn't have even been subject to that second test. Of course, there's no evidence that the grievant asked management and was led to believe that as long as he was on light duty it was okay to go out and use cocaine. So, the union does have that problem.

Beyond that, moreover, it was proper and necessary for the employer to have the grievant in the random testing pool at the time of the second test. The DOT's implementation guidelines discuss who should and should not be pulled out of a random testing pool. The guidelines state that an employee should not be part of a pool if he's off work, on a long-term layoff or leave of absence of some sort, and will be off work the entire period through the next testing. Here, the grievant was not on a leave of absence. He was working, and on top of that, the evidence does not suggest that he was for certain going to be on light duty all the way through the entire period until the next random test. For all the employer knew, the grievant's doctor could have eased or released the grievant's work restrictions at any time. In these circumstances, he had to stay in the random testing pool. Think of the consequences otherwise. If he was passed over on the date of the second test, he could have returned to work with cocaine still in his system, driving a big commercial truck, working on power lines, endangering himself, his co-workers, and the community. The company had just cause to discharge the cocaine-using grievant from employment.

Nancy Walker: We spent the day today with Jerry Davidson. What a fine man he is. He's a long-term employee. Seventeen years with this company on warm days, on cool days, on wet days, on dry days. For 17 years, Mr. Davidson was on a pole working for Gonzo

Utility. That's why the technical application of the policy that was meant to help employees have the opportunity to rehabilitate, to rethink their lives, is particularly egregious. Applying that against this long-term employee is just a travesty.

Let's talk a moment about this policy. It's a policy that was brought about because the Department of Transportation regulations require that anyone who holds a commercial driver's license be randomly drug tested. It is a "two strikes you're out" rule. Let's be clear. Two positive drug tests, and you will lose your job at Gonzo Utility. There is a provision that if an employee refuses to take a drug test he might be disciplined. But there is nothing, I underscore, there is nothing in the policy that says the refusal to take a drug test is counted as a positive test.

Now, let's look at the two factual predicates for the discharge of Mr. Davidson. In January 2009, here's what did not happen. There was no positive drug test. Instead, poor Mr. Davidson was working an excessive work schedule. He worked 15 consecutive days, 14 hours a day, in violation, by the way, of the same Department of Transportation regulation that required the testing in the first place. He returns to work to drop his truck off and to then drive three hours to his home for a much earned, much needed vacation day, just to find out that, once again, you heard the testimony, an inordinate number of drug tests were directed at Mr. Davidson. He said to his supervisor, "I've had enough. I need my vacation day," and proceeded to take it. There's no evidence that they didn't give him the vacation day, that they had withheld pay, or that they disciplined him in any way for taking his vacation day. In fact, there is nothing in the record at that moment in time that Mr. Davidson would have believed for a second that his taking of his much-earned vacation day would count as a positive drug test.

Now, let's move forward two years. It is now April of 2011, and for the first time in 17 years, Mr. Davidson has a positive drug test. Let's look at the circumstances surrounding that. We know from the heartfelt testimony we heard today that Mr. Davidson almost lost his life in the service of this company when he fell 30 feet from his bucket truck. He was off work for a long period of time. When he returned, he returned for light duty with significant medical restrictions, chief among which was that he was not to drive a vehicle. Ergo, he should never have been in the Department of Transportation pool for random drug testing.

But in the end, he did, unfortunately, test positive. And, we heard him today: a more contrite, remorseful man we have not

met; so willing to accept responsibility for his error, and we all were cheering him on as he told us about the rehabilitation program that he was involved in. In light of the lack of clarity as my colleague candidly admitted to the policy, in light of Mr. Davidson's 17 years of committed and dedicated service, I urge you to sustain this grievance and to reinstate Mr. Davidson. I ask you to give Mr. Davidson a much-earned second chance.

Robert Moberly: All right. Was the discharge justified?

Homer La Rue: In order to expedite this, I'm going to speak on behalf of the panel, and then the panel will add something if members wish to do so. Our unanimous decision is that the discipline was justified, but we would reduce the penalty. The drug test for which the grievant was terminated would be considered a first instance of testing positive. The company acknowledged that its first test was defective; and therefore it should not be deemed a first test. The company's actions in disciplining the employee for not reporting to the first test is not cured either by the notice of discipline or by any other actions by the company prior to the second test. There is, therefore, no concession on the part of the union that the union has accepted the company's interpretation of the policy. That is, there is no waiver by the union of its position or argument in opposition that put forward by the company. The panel would find no reason to reach any of the arguments raised by counsel for the union or the company.

Sick Leave

Robert Moberly: Problem number four. Sally Smith is a clerical worker for the City of New Rome. She misses work for a week and provides a note from her doctor saying she was absent due to illness. The City does not challenge this note. At the end of the week, Sally calls to say she will be out for six weeks and has been referred to a specialist. The City requests another doctor's note. The doctor provides a note stating that Sally will be out for six weeks due to an ongoing medical condition for which she is receiving care. He also states that he referred Sally to a specialist who cannot see her for three weeks. No other detail of the diagnosis or prognosis is provided. The City refuses to accept the note and tells Sally that, until more information is provided, she will not receive sick pay. The City gives her a detailed generic medical form for her doctor to complete. The doctor refuses to cooperate. He does not believe the City has the right to the information

requested. Also, he is offended by the challenge to his note and the threat to Sally.

The collective agreement is silent on medical information. The union files a grievance claiming that sick leave pay is being improperly withheld.

Question: Should the grievance be sustained?

Bill O'Brien: Here we have an employer, the City of New Rome, that refuses to pay contractually mandated sick pay to an employee whose doctor has confirmed that she is sick. Sick employees are entitled to sick pay. There can be no dispute about that here. The precise nature of their sickness, whether they have cancer or heart disease, what their treatment plan or prognosis may be, is immaterial to the inquiry of whether they're sick. In truth, the employer here is withholding sick pay as a means to leverage information from the doctor that the employer is not entitled to. Doctors are covered by HIPAA,² and HIPAA privacy rules prohibit a doctor from disclosing protected medical information, for purposes of employment inquiries. The grievant's doctor here did precisely what he is required to do, which is to maintain the privacy of his patient's medical condition.

There is an understandable impulse that we all have when a co-worker is sick, that employers have when their employees are sick, to want to know the intimate details of their medical conditions. The fact that we have that impulse and that desire does not mean, however, that we are entitled to the information. Legislatures, courts, and arbitrators have resoundingly established the rule that an employee's medical condition is private to the employee. This privacy principle is embedded in the ADA and in the FMLA. An employer's access to an employee's medical information is limited to narrow questions such as how long an employee may be off work, when they are expected to return, and, on their return to work, whether they are able to perform the job's essential functions with or without reasonable accommodation.

Here, the employer knows the employee is ill. Ms. Smith's doctor has confirmed this. The employer knows Ms. Smith is to see a specialist about a serious illness. The employer knows that Ms. Smith is going to be away from work for a designated period of time. Upon the grievant's return to work, the employer may be

²Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

entitled to information necessary to determine whether Ms. Smith can perform the essential functions of her job.

The only question for the panel at this point, however, is whether Ms. Smith is away from work because she is sick. Because that can't be disputed, she is entitled to the contractual guarantee of sick pay. The grievance should be sustained.

Thomas Trachsel: The contract is silent on medical information. There is no language in the contract that prohibits the employer from requiring verification or from seeking clarification or additional information. It would have been very easy to say that if that's what the parties intended. The absence of restrictive language proves that the parties didn't intend to limit the employer. And, of course, the arbitrator doesn't have the authority to add to the contract.

Moreover, in the absence of specific controlling language, it's well established that an employer faced with a request to use paid sick leave may require adequate documentation of illness, provided that the employer is acting reasonably and not in a manner that's arbitrary, capricious, or discriminatory. That's what it says in *How Arbitration Works*.³ That's what it says in *Grievance Guide*⁴ and in *The Common Law of the Workplace*.⁵

That's the standard. And that makes sense. After all, paid sick leave is just that—it's for illness. It's not vacation time. An employer must have the ability to verify that an employee is unable to work because of illness before paying out weeks of sick leave.

The employer's request for adequate documentation in this case was eminently reasonable. First, there's no evidence that the employer uniformly or as a matter of course requires all employees in all circumstances to come up with a good doctor's note.

Second, there's nothing in the note to provide any real indication that the employee was incapable of working. In fact, if she were so sick, why could she wait three weeks before even getting in to see the specialist?

Third, the doctor's note is simply devoid of any details regarding the employee's diagnosis or prognosis. To be adequate, the doctor's note should at least contain some indication of the symptoms, a diagnosis, and comments on recovery. How else can the

³ELKOURI & ELKOURI: *HOW ARBITRATION WORKS* (Alan Miles Rubin, ed., 6th ed. 2003).

⁴BUREAU OF NATIONAL AFFAIRS, *GRIEVANCE GUIDE* (10th ed. 2000).

⁵NATIONAL ACADEMY OF ARBITRATORS, *THE COMMON LAW OF THE WORKPLACE: THE VIEW OF ARBITRATORS* (Theodore St. Antoine ed., 2nd ed. 2005).

employer even consider whether the doctor's note corroborates the employee's claim of illness?

Although the employer provided the grievant with a detailed generic medical form for the doctor to complete, there's no suggestion that the employer was asking for inappropriate information or excessive information. In any case, regardless of what the form may have requested, the doctor refused to provide any additional information at all, and it was on the basis of receiving no additional information that the employer denied the request.

Fourth, we're talking about the grievant's doctor. The onus cannot be put on the employer to get her doctor to provide additional information. It was up to the grievant to leverage her relationship with her doctor to give us adequate documentation of the illness.

Perhaps if the employer's request was somehow in violation of or inconsistent with some external law, such as the FMLA or the ADA, the union might have a better argument that the employer's request was unreasonable. But the request was not in any way inconsistent with the FMLA or the ADA or any other external law.

Under the circumstances, the employer's request for adequate medical documentation was reasonable, and the grievance must be denied.

George Fleischli: I would grant the grievance. There was no contract requirement that she give specifics in order to use this earned benefit. This is an invasion of privacy without a showing of justification. There's no showing of abuse or deception on her part, or that the doctor was complicit.

It's significant that the doctor is refusing to cooperate in this case. There may be something very sensitive going on here.

I don't think the employer is entitled to adopt a policy in mid dispute. If the employer wants to adopt a reasonable policy prospectively and discuss it with the union, I think they can do so. But they haven't done it in this case.

Paula Knopf: I don't see this as a policy grievance. I see it as a fact-specific, individual grievance. The approach must be one that balances the employer's interest in knowing whether an employee is properly off with a legitimate illness for a reasonable amount of time with the employee's right to privacy. In Canada, we try to balance those rights by saying an employee's right to privacy entitles him or her to keep confidential the diagnosis and the specifics of the condition. But the employer also has a right to be told the nature of the illness so that it can understand why the employee

can't be at work for the estimated time and/or cannot return to modified duties.

In this situation, the grievor has simply not provided enough information. She simply said, "I'm off work due to medical reasons." That is not enough for the employer to know why she is not at work and/or why she will be off for six weeks. The employer is not able to properly assess whether or not the six weeks return to work date is legitimate.

With a little bit more information, I might have allowed the grievance. But the employee's refusal to give that information and/or the union's failure to provide that information would make me deny the grievance.

Homer La Rue: I concur with my Canadian cohort on this one. I think that it's not unreasonable for the employer to know the basis for the employee's extended absence from work, and the fact that the company accepted the first reason for her to be out of work for one week does not constitute a waiver of the company to request additional information upon knowing that she's going to be out for an extended period of time.

Robert Moberly: We have a split decision. Many thanks to the arbitrators, advocates, and audience members for your participation in this session.