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A DILEMMA IN ARBITRATION

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## ALCOHOLISM IN DISCIPLINE: A DILEMMA IN ARBITRATION

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The contemporary social phenomenon of widespread consumption of alcohol has increasingly manifested itself in employer-employee relations. Accordingly, arbitrators are required to adjudicate discipline and discharge matters involving either alcoholism or alcohol-related misconduct. Further, representatives of both labor and management, and neutrals alike often comment as to the absence of consistent criteria to facilitate development of effective policy and procedures for disciplining the affected employees. The absence of such criteria magnifies the difficulty of preparation of adequate cases representing the positions of either party for evaluation by a neutral in the arbitration process.

Despite increasing union-management cooperation, discipline and discharge of problem drinkers continues to occur and such action frequently results in the search for redress through a negotiated grievance procedure. The extent to which a grievance and subsequent arbitration proceeding involves the inherent difficulty of identification of the grievant as either a problem drinker or alcoholic was first recognized in 1975 by Gerald Somers, a recognized academician and practicing arbitrator.<sup>1</sup> Somer's study revealed the following: (1) serious cases of alcoholism or alcohol-related behavior develop over a prolonged time period, (2) the alcoholic employee is likely to have demonstrated behaviors characterized by extended and unexcused absenteeism and tardiness, and (3) alcoholic employees exhibit

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The author was assisted in data collection and analysis by Jim Laumeyer, candidate for the Master of Business Administration degree at the University of Minnesota, Duluth. Laumeyer is currently employed by the Minnesota Department of Transportation as District Business Manager.

other characteristics commonly associated with reduced productivity, for example poor quality performance at the work location at some point prior to the "specific overt act of misconduct" that precipitates the disciplinary action. Finally, Somers noted that two factors may influence an allegation of unsubordination and/or violence as the basis for disciplinary action which is in fact premised upon alcohol related behavior. These factors are: (1) the employers perception of the extent to which accepted criteria of just-cause and due process are involved in both the grievance procedure and arbitration, and (2) the unique difficulties inherent in documentation of compelling evidence of declining productivity.

Trice concluded that published arbitration awards may be characterized as emphasizing specific types of overt acts of misconduct.<sup>2</sup> This review of approximately one hundred published awards involving the "emotionally disturbed or alcoholic employee" indicated that absenteeism was cited as the reason for discharge in approximately eight percent of those cases. Intoxication or drinking on the job site, or possession of alcoholic beverages was cited in approximately three-fourths of the discharge proceedings.

Therefore, the objective of this study was to examine published private sector discipline and discharge awards involving alcoholism and alcohol-related behavior for the period 1964 through 1978 to identify (1) the extent to which such employer disciplinary action was either sustained or denied, and (2) the specific rationale and/or philosophy promulgated by the arbitrator as basis for that decision.

## RESULTS

The results of a review of ninety-four awards for the period 1964 through 1978 are presented in Table I. The following data indicate that individual arbitrators elected to deny the union's grievance in less than half (42%) of the awards, and to sustain the grievance in fifty-eight percent of the matters.

Table 1  
Basis for Arbitrators Decision  
1964 through 1978  
(n=94)

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Grievance Denied (n=40)	
<u>Primary Reason</u>	<u>Percentage</u>
Unable to Perform Duties	9
Refused treatment for Alcholism	6
Rule Established and Enforced	64
Violated Provisions of Reinstatement	18
Other	3
	<u>100%</u>

  

Grievance Sustained (n=54)	
<u>Primary Reason</u>	<u>Percentage</u>
Long Service	11
Treatment; Instead of Discharge	4.5
"Just Cause" not substantiated	78
"Due Process" not accorded	3.5
Other	3
	<u>100.0%</u>

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Ordered Reinstatement of Grievant (n=23)	
<u>Reason</u>	<u>Percentage</u>
Long Service	35
Treatment; Instead of Discharge	39
"Just Cause" not substantiated	22
"Due Process" not accorded	4
	<u>100%</u>

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Further, in approximately two thirds (64%) of the awards where the employer's disciplinary action was adjudged for sufficient cause and/or adequate due process pursuant to the provisions of the negotiated agreement, the primary reason cited by the arbitrator was either (1) the existance of a well established and enforced rule related to use and/or possession of alcohol, or (2) a specific provision in the

the agreement that such behavior constituted an inherent hazard for either the employee or affected co-workers.

In approximately three fourths (78%) of those awards where the union's grievance was sustained, the singular compelling reason for the decision was the employer's failure to adequately document the burden of proof so as to establish just or sufficient cause. Specifically, the employer's action and presentation were characterized as involving either (1) insufficient evidence typically evaluated in terms of the accepted and well documented philosophy of corrective or progressive discipline, or (2) the absence of a well defined work rule and/or a pattern of inconsistent enforcement of such rule. Further, in only a small proportion (i.e., less than four percent) of the awards did the arbitrator unilaterally impose the philosophical and inherent sequential characteristics of corrective discipline in the absence of either a negotiated provision or well documented and mutually accepted practice between the parties.<sup>3</sup>

An examination of the discharge cases which resulted in reinstatement of the grievant (regardless if back pay was ordered) indicates an absence of any single compelling rationale. In thirty-nine percent of the awards reinstatement was coupled with the grievant's commitment to seek treatment in lieu of discharge, while length of service was cited as rationale for reinstatement in thirty five percent of the awards. (The average length of service for such employees was twenty two years, although the range was five through twenty seven years.) Finally, insufficient cause or due process were cited as the primary reasons for reinstatement in significantly fewer awards, (22% and 4%) respectively.

The data in Table II summarize the resolution of disputes involving employees diagnosed through either self-admission or medical examination to be alcoholics. Again, the data indicate the primary reasons provided by the arbitrator to deny a union grievance were the existence of a well defined and consistently enforced

Table II  
Awards Recognizing An Alcoholic Employee  
(n=10)

<u>Reason Grievance Denied (60%)</u>	<u>Percentage</u>	<u>Percentage of Combinations</u>
1. Unable to Perform Duties	0	1 & 2 = 20
2. Refused Treatment for Alcoholism	10	
3. Rule Established and Enforced	50	
4. Violated Provision of Reinstatement	30	
 <u>Reason Grievance Sustained (40%)</u>		
A. Long Service	0	A & B = 60
B. Treatment; Instead of Discharge	0	B & C = 30
C. "Just Cause" not substantiated	10	
D. "Due Process" not accorded	0	
	<u>100%</u>	

work rule, and violation of a provision inherent in either the instant case or some previous reinstatement. Interestingly, the average number of previous efforts to treat the disease was two (ranging from 1 through 4) specific attempts. Again, whether the employee's length of service in combination with a stipulated directive to accept treatment, or the latter in combination with a perceived inadequacy of cause were the primary reasons or were adjudged as circumstantial, such factors were consistently afforded by the arbitrator as the bases for the decision.

The data indicate in more than half (60%) of the discharge proceedings involving a recognized or self avowed alcoholic the grievance was denied. Analysis of the basis for such decisions indicates that in approximately one third (30%) of the awards the grievant had previously been reinstated and subsequently committed offenses sufficient to merit discharge. Also, ten percent involved grievants who refused to accept treatment afforded by the employer and were characterized as unable to accept the reality of the illness. Further, each of the remaining (50%) grievances involved alleged violation of established rules and/or policy for an

offense specified in the negotiated agreement for which discharge was cited as the appropriate penalty. Finally, the data indicate an absence of a single compelling factor in the arbitrator's decision to sustain a grievance. The combination of employee length of service and acceptance of treatment, or the combination of the latter with absence of sufficient cause were accorded primary in sixty and thirty percent of the awards, respectively.

It must also be noted that in nearly all (approximately 91%) of the instances where the arbitrator sustained the discharge of an alcoholic employee, the assertion that alcoholism is an illness was not afforded significant comment in the award. Conversely, in each of the matters cited above resulting in a decision to deny or modify the discharge, the arbitrator specifically notes either a personal reflection and/or supporting documentation recognizing alcoholism as an illness or disease.

#### DISCUSSION

The problem of employee discipline and/or discharge has been subject to extensive review. However, recently the unique aspects of such action in matters including either alcoholism or alcohol-related behavior has increasingly become subject for third party review in the arbitration process. Accordingly, this study was conducted to determine the extent to which such disciplinary action was either sustained or denied by the arbitrator, and the primary rationale promulgated as the basis for that decision.

The primary reasons cited or strongly inferred by Arbitrators for sustaining a grievance were: (1) the employee's length of service, (2) a philosophical judgement that treatment was perceived preferential to discharge (as consistent with a principle of progressive or corrective discipline), (3) the inability of the employer to sustain the burden proof associated with "just cause", and (4) a procedural deficiency in affording the grievant full due process as defined

either by the Agreement or the axioms of neutrals. In addition, the review suggests the first three factors cited above for sustaining a grievance were also cited as the primary reasons for the decision to reinstate a discharged employee.

In those matters involving a recognized and/or diagnosed alcoholic employee, approximately forty-one percent were reinstated. In approximately one-third of the remaining majority of awards where the grievance was denied, the grievant had previously been reinstated for a similar or related offense. The primary reason for sustaining the discharge was violation of either some well defined work rule or a stipulation to acceptance of treatment. Further, the combination of the grievant's length of service and stipulation for acceptance of treatment were the primary bases for a directive of reinstatement.

Therefore, the extent to which an arbitrator perceives alcoholism or alcohol-related behavior to be similar, and/or the extent to which the former shall be uniquely treated as an illness appears paramount in the rationale provided to substantiate an Award. For those Arbitrators who perceive alcoholism to be a treatable illness, the actions of the employee to seek and utilize treatment appear critical. Conversely, where the employer has exercised accepted initiative to direct the employee to appropriate treatment, but without success, even those Arbitrators expressing a philosophical sympathy for the grievant are reluctant to sustain the grievance. Arbitrators appear to consistently support the concept of corrective discipline, further, they generally perceive the sequential series of progressively more severe actions of the Employer to permit the employee to modify behavior inherent in such philosophy to be the essential characteristics necessary to attain their support for either discipline or discharge of an employee. Finally, an employee's failure to achieve behavior modification through such sequential opportunity is generally



## REFERENCE NOTES

1. For a detailed discussion see: Somers, Gerald, "Alcohol and Just Cause for Discharge," Proceedings, 28th National Academy of Arbitrators, 1975.
2. For a comprehensive discussion of the emotionally disturbed and alcoholic employee and the basis for an employer decision to discharge, see: Trice, Harrison, Emotional Health and Employer Responsibility, New York State School of Industrial and Labor Relations, Cornell University, Ithica, New York, 1966.
3. For a highly detailed and documented review of the extent to which arbitrators may be reluctant to impose the progressive disciplinary criteria in absence of either a contractual provision or mutually accepted practice see: Elkouri, Frank and Edna Elkouri, How Arbitration Works, (3rd Edition), Bureau of National Affairs, Inc., Washington, D.C., 1973, Chapter 15.