

**FIREFIGHTERS' OFF-DUTY MISCONDUCT
AND "JUST CAUSE" FOR DISCIPLINE:
A REVIEW OF ARBITRATION CASES**

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ABSTRACT

This article reviews the status of employer security of off-duty (mis)conduct by firefighters in the public sector. Arbitration cases involving firefighters were reviewed to identify the criteria used to sustain or deny the employees' claims that their employer fire districts lacked just cause to impose discipline. One question addressed was: "Is illegality of the conduct a necessary condition or sufficient condition for the imposition of discipline?" The criteria applied in recent arbitration cases were then compared to those used in the private sector.

Unionized employees negotiate protection from unwarranted on-the-job discipline and incorporate agreement in contract provisions. The contract with one Oregon public sector employer is typical. It states, in part, that the "[d]istrict shall not discipline, reprimand, suspend, reduce in compensation, or discharge any employee (non-probationary) without just cause" [1, p. 500]. This applies to both on-the-job and off-the-job conduct. The general rule is that an employee's off-duty conduct is not subject to management approval or disapproval. That is, public employees retain their right to conduct their private lives as they see fit, free from scrutiny by their government employers. This article examines exceptions to that norm—cases of discipline taken against firefighters for their *off-duty* conduct.

When management officials believe there is sufficient cause to take disciplinary action against a public employee and act on that belief, the employee may file a grievance under provisions of the prevailing collective bargaining agreement. The grievance may claim that management's action is not based on just cause or that the discipline imposed is too severe for the offense. Many grievances are resolved through discussion between management and union representatives during the initial and middle steps of the negotiated grievance procedure. Unresolved disputes are often referred to arbitration so that an experienced, neutral party might render a binding decision on the issue(s) after listening to advocates and witnesses for both sides.

This article identifies the principles used by arbitrators to decide the firefighter cases placed before them. The incidents that gave rise to discipline were varied and sometimes narrow in scope. Nonetheless, some unifying features are identifiable and some principles appear to be controlling in the arbitral decisions. The authors attempt to give some insight in this article about the licit scope of managerial intrusion into the privacy of these public employees.

MOONLIGHTING IN AN UNSAVORY ESTABLISHMENT

Legal, but unacceptable, conduct was examined before looking at episodes of illegal conduct. The first case involves legal, off-duty employment by an assistant fire chief in Oklahoma who worked a second job for a number of years as a bouncer in a nearby city. This moonlighting became an issue only because his secondary employer was a bar that featured topless waitresses [2]. His department charged him with violating a rule that prohibited outside work in an establishment that would discredit a member of the fire department. For violating the rule, he was suspended without pay for three days.

The arbitration decision cited a 37-year old Pennsylvania case that held a municipality *can* discipline employees for unbecoming conduct even if the conduct is not criminal. As no disparate treatment was evidenced, the grievance was denied, and management's imposition of discipline was sustained.

No recent legal or arbitral decisions with similar factual situations were referenced. The arbitrator was able to reach a decision in this case without analyzing the impact of the grievant's employment on the public's respect for the fire department.

CHARGED WITH HARASSMENT, BUT NOT CONVICTED

Employers sometimes learn of off-duty misconduct following the filing of criminal charges. There may be an incentive to take action to protect the reputation

of the employing department. The following case illustrates the review of managerial action taken in the absence of a criminal conviction.

A firefighter/paramedic was accused of off-duty harassment of his ex-girlfriend, who was employed as a police officer in the same city [3]. Numerous incidents apparently occurred after their breakup, varying from annoying phone messages (to the police officer and her family) to what were arguably death threats against the police officer. Criminal charges were filed initially, but were later dropped.

The firefighter was discharged for this misconduct, and he grieved the severe discipline. The arbitrator found a “reasonable nexus” between the off-duty misconduct and the employee’s job as a firefighter. Specifically, the work relations between the officers of the fire and police departments could well be negatively affected by misconduct aimed against a member of the police department. An aggravating circumstance was the record of two prior incidents (of harassment of other women) in the grievant’s employment folder. The discharge was sustained.

ILLEGAL OFF-DUTY DRUG USE

Understandably, employers are more likely to take exception to illegal behaviors of their employees than legal behaviors. The following cases of illegal misconduct illustrate the considerations relevant to a determination of just cause for discipline on review by an arbitrator.

A Connecticut Case

A Connecticut case involved a firefighter who had previously completed a drug rehabilitation program and was arrested for off-duty possession of crack cocaine. He was suspended without pay until his conviction later the same year, at which time he was terminated from employment [4, p. 328].

The arbitration panel held that Connecticut firefighters—unlike police officers—“are no more responsible than any other public employee for their off-duty behavior” [4, p. 331]. The panel, however, did not cite any previous arbitration decisions to support that holding. As the city had not demonstrated actual “adverse public reaction,” the arbitration panel could not conclude that the employee had brought “disrepute upon the Department” [4, p. 331]. Significantly, the employer treated the grievant differently from two other firefighters (who had been arrested earlier for drug possession). The panel noted that the city’s Employee Assistance Program had suggested that the city had a commitment to rehabilitation rather than retribution. As such, the termination in the Connecticut case was reduced to a period of suspension without pay.

An Illinois Case

In an Illinois case, a firefighter's illegal use of drugs was discovered through drug screening. (It appears that the drug use occurred off duty and that the employer illicitly required submission to the screening in this case, thus barring the evidence from use in criminal proceedings.) The arbitrator explained that his interpretation of the contract, and city rules incorporated into it, led to the conclusion that the

[c]ity is obliged to demonstrate that the Grievant's actions were somehow subject to public knowledge, thereby providing the connection with the Department risking its good reputation. . . . Drug or alcohol abuse, alone, is insufficient [to show discredit] unless the reputation, credit, trustworthiness, or the public's confidence can be shown to be directly jeopardized by the employee's actions. . . . It is, however true that alcohol or drug abuse certainly have the potential for bringing . . . disgrace upon the Department. A general proscription of objectionable behaviors is far less certain and predictable *than clear bars to specific behavior* (emphasis added) [5, p. 687].

A California Case

A California firefighter admitted to and was arrested for off-duty possession of methamphetamine. The firefighter was given a "deferred entry of judgment" [6, 8999-111] pending successful completion of the drug diversion program that was ordered when the grievant pleaded no contest. The arbitrator ruled that the California labor code precludes adverse employer action against an employee on the basis of a deferred entry of judgment. The employee's termination was ruled without just cause unless the employee has a judgment of guilty entered at some future time, perhaps for failure to complete the rehabilitation program.

An Oklahoma Case

In an Oklahoma case, a firefighter was reprimanded and suspended for 84 days for conduct unbecoming an employee of the city after he was arrested for drug possession. His identity was discovered on a caller-ID box during a drug investigation. The firefighter was initially suspended without pay pending disposition of the legal charges. He pleaded *no contest* to the charges and received an unsupervised, deferred sentence of two years and a \$500 fine. The firefighter filed a grievance seeking back pay for the period of the suspension and removal of the reprimand (and references to the incident) from his personnel file.

The arbitrator in the Oklahoma case found that the fire chief did not need a court verdict of guilty in order to licitly discipline the firefighter for unbecoming conduct; furthermore, the fire chief was entitled to consider the fine, because of its size, in imposing discipline. The arbitrator explained that "[r]egardless of the actions taken by the courts, employers may require a standard of conduct that is

higher than that applied by the courts in criminal cases. This is especially the case for public safety personnel who occupy a position of public trust" [7, p. 392]. The arbitrator did award back pay for a portion of the suspension that exceeded the maximum number of days without pay allowed under contract. (The published arbitration award did not directly address the union assertion that since the public was unaware of the conviction, no denigration of public trust was attributable to the grievant.)

OFF-DUTY CRIMINAL SEXUAL ACTIVITY

A male Utah firefighter was arrested for engaging in off-duty, consensual sexual relations with a male youth in Texas. The incident occurred at a public facility near a location where the firefighter was attending training sessions. He pleaded guilty, was placed on seven years' probation (deferred without an adjudication of guilt), and was required to register as a sex offender in both states [8].

The federal employer initially suspended the firefighter's government security clearance and subsequently terminated him. The issue of just cause ultimately went to arbitration. The arbitrator (like the court and the counseling psychologist) believed that the employee truly thought that the youth was an adult and that the employee posed no future sexual threat to minors. The arbitrator did not find isolated instances of harassment of Utah firefighters at the training site sufficient to conclude that the crime resulted in on-the-job work impairment. This conclusion was based on 10 letters of support from local Utah firefighters for the grievant.

The arbitration award ordered the grievant to be reinstated in his former position when and if the grievant's security clearance was reinstated. (Permanent revocation of security clearance is not subject to arbitral review and necessarily leads to termination of the employee for failure to meet a job requirement.) The arbitrator recommended, but did not order, temporary placement of the grievant "in a position of comparable pay and rank that does not require a security clearance" [8, p. 6927] until the final security clearance determination was made.

OFF-DUTY SHOPLIFTING

A Nevada firefighter with 24 years of generally excellent performance was discharged after a repeat incident of off-duty shoplifting. The grievant had first shoplifted approximately seven years before the instant case and had been reprimanded by the department. The second, discharge-causing incident occurred when the grievant placed a book and software program valued at about \$25 inside his vest. The vest was openly marked "Las Vegas Fire Department." After his apprehension, he signed a citation that was an admission of intentional theft, although the criminal proceeding had not been concluded at the time of the arbitration decision.

The arbitrator cited a number of other arbitrations in which public employees were validly discharged for off-duty behavior. Considering both the explicit department rule against breaking any law and the near certainty that word of the grievant's shoplifting detention had spread, the discharge was upheld. "Firefighters are not sworn peace officers in Nevada. A link to affecting the public's perception of the LVFD because of off-duty shoplifting is not as direct as with a peace officer. . . . [But the] public has the right to expect members of the Las Vegas Fire Department not to break the law" [9, p. 404].

OFF-DUTY MANSLAUGHTER

A fire department driver was discharged after he pleaded *nolo contendere* to a felony charge of second degree manslaughter [10]. While off duty, the employee operated a boat on a lake and engaged in horseplay with another boat. The horseplay turned into a game of "chicken" that ended with a collision that caused the drowning death of a passenger of the other boat.

The city argued forcefully for discharge. "Despite the fact that he pleaded no contest to a charge of manslaughter in the second degree, he still contends that he only committed an illegal left turn. This employee is charged with the public safety of citizens. [Grievant's] duties involve the operation of a heavy piece of equipment. By his own conduct in wearing a Fire Fighter dress uniform to court on two occasions, [he] injected the City into his misconduct even further" [10, p. 95].

The arbitrator cited a state statute which described a public policy that government employees forfeit their employment when convicted of a felony. The decision also cited a number of federal court decisions allowing the discharge of municipal employees for off-duty misconduct. These decisions specifically support the notion that the offense of "conduct unbecoming an officer" is an appropriate standard for firefighter-discipline cases.

This discharge, however, was reduced to an extended, unpaid suspension similar to the city's (previous) handling of off-duty, alcohol-related driving offenses. Acknowledging that the "manslaughter . . . probably brought some degree of embarrassment on the City, . . . [the grievant's] off-duty behavior has no effect on his ability to perform as a Fire Fighter" [10, p. 100].

OFF-DUTY DOMESTIC VIOLENCE

Without a Criminal Conviction

A firefighter had worked for the city of St. Petersburg [Florida] for 15 years. Over that time he had received generally satisfactory performance reviews. One blot on his record was a 30-day suspension four years prior for general insubordination. The incident that gave rise to the grievant's termination occurred

off duty when the grievant and his fiancée had a serious physical altercation. The grievant and his fiancée struck each other several times, and both were injured. Police and paramedics came to the scene but no one was arrested. The fiancée later lodged a complaint with prosecutors. No charges were filed once the grievant agreed to receive counseling.

The fire department fired the grievant for violating the rule that forbids “immoral, unlawful or improper conduct or indecency, either on or off the job, which would tend to affect the employee’s relationship to his job, his fellow workers, his reputation or his goodwill in the community” [11].

The arbitrator could not find sufficient evidence of a connection between the grievant’s conduct and an adverse impact on the fire department or his ability to work with co-workers. The arbitrator also found a disparity between the grievant’s discipline, i.e., discharge, and the less-severe discipline other department employees had previously received for similar incidents. Therefore, the grievant was reinstated without back pay. The arbitrator believed that back pay would unfairly penalize the city, noting that the grievant had collected unemployment compensation while terminated.

With a Criminal Conviction

A 22-year fire-equipment operator in Reno, Nevada, was an admitted alcoholic. While off duty and intoxicated, he threatened his wife with a gun and then drove away from their home. She called the police, and he was arrested soon thereafter. He was charged with felony assault with a deadly weapon, driving while under the influence of alcohol (DUI), and felony domestic battery. The incident was reported by the local news media. He later pleaded *nolo contendere* and was found guilty of the DUI charge, a misdemeanor, and misdemeanor battery. The other charges were dropped. His driver’s license was also suspended [12].

The department first placed him on paid administrative leave, but later placed him on unpaid leave, claiming the grievant did not possess the required license for his driving position. He returned to a paid position about one month later, after his driver’s license had been reinstated. His grievance stated that he should not have been placed on unpaid leave because the criminal charges were still pending.

The arbitrator found that the department had acted only because of his failure to maintain the license. However, the arbitrator also found that the department could have found other nondriving, but paid, work for the grievant during the period of his license suspension. The arbitrator sustained the grievance, basing her decision on: a) the department’s previous handling of similar situations with other employees; and b) the spirit of the department’s employee assistance program (EAP). The EAP’s purpose, as is often stated, is rehabilitative rather than punitive.

CONCLUSIONS

The authors' review of arbitration decisions reported from 1989-2002 is not presented as an exhaustive treatment of *all* off-duty conduct disciplinary actions over that time period. Rather, this article covers only cases involving firefighters whose misconduct was off duty, whose cases proceeded all the way to arbitration, and whose cases were submitted by the arbitrator to either of the two major reporting services with subsequent acceptance for publication. Nonetheless, the principles enunciated in the decisions are instructive.

It is well-established that public employees' off-duty conduct is subject to employer scrutiny and discipline to a greater extent than similar conduct by a worker hired by a private employer. Within the public sector, police officers are normally held to a more rigid standard than others since they are sworn, uniformed, and armed employees [13, p. 139]. Teachers, too, may be held to a higher standard than others since they are expected to be role models for the children in their care [14, p. 420].

Firefighters are sometimes distinguished from the vast majority of public employees because they are uniformed. Therefore, they may be more likely to carry with them the reputations of their employers.

As in the private sector, public employers are expected to show that *just cause* exists for disciplining, usually satisfying criteria outlined by Arbitrator Carroll R. Daugherty in 1964 [15]. Private and public sector employers are expected to provide a sufficiently strong nexus or connection between the off-duty conduct and employer's legitimate business concerns in order to demonstrate *just cause*.

Sometimes, as with the Oklahoma "bouncer" [2], the nexus is established because management has a specific rule that prohibits the conduct for which the employee is disciplined. Such rules will be given more import if the union has had the opportunity to "negotiate out" during subsequent collective bargaining and has not done so.

Other times, as with the Nevada "shoplifter" [9], the nexus might be demonstrated by likely or actual reputational harm to the employer's reputation. The arbitrator commented that firefighter misconduct is not scrutinized as much as police officer misconduct off duty.

A third method of showing a nexus to the job is by demonstrating likely or actual harm to work productivity or work relationships. The work relationships might be intradepartmental or across departments. The employer failed to meet that burden of proof in instances of "manslaughter" [10] and "sexual misconduct" [8], but the employer did meet the burden in a case of "physical harassment" [3].

A criminal conviction is neither a necessary condition (as in "domestic violence" [11]) nor a sufficient condition (as in "sexual misconduct" [8]) for a

finding of just cause for discipline. But a criminal conviction, *ceteris paribus*, does provide support (as in the “shoplifting” case [9]) for such a finding.

An arbitrator is bound by the contract between the employer and the employees’ exclusive representative. The Illinois “drug use” case [5] highlighted the fact that the more specific the employer’s language is with regard to proscribed off-duty conduct, the more likely it is that discipline imposed by management will survive arbitral review.

The California “drug use” case highlighted the arbitral standard that contract language, such as “just cause,” should have its meaning interpreted in such a way as to be consistent with prevailing law if possible. The California statute prohibiting use of “deferred entry of judgment” would not have prevented the firefighter from being disciplined had the evidence of misconduct been acquired by other means.

Abuse of substances taken legal and illegally constitute a significant fraction of the cases reviewed. The expansion of employee assistance programs in the 1990s has given public notice of the desire for remedial action in such cases. This trend is consistent with the avowed purpose of mutually negotiated disciplinary systems, to assist employees in overcoming their addictions prior to resort to disciplinary processes.

REFERENCES

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