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DISCIPLINING PUBLIC SCHOOL EMPLOYEES FOR OFF-DUTY (MIS)CONDUCT: A REVIEW OF ARBITRATION DECISIONS

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ABSTRACT

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

Unionized employees negotiate protection from unwarranted discipline—warnings, suspension, and terminations—and incorporate agreement into written contract provisions. The contract with one Oregon school district is illustrative, stating in part: the "District shall not discipline, reprimand, suspend, reduce in compensation, or discharge any employee (non-probationary) without just cause" [1, p. 500]. With such contract provisions, an employee's off-duty conduct is generally not subject to management approval or disapproval. Such public employees retain the 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 public school employees for their *off-duty* conduct. Management has just cause only if there is a connection or a nexus between the off-duty conduct and the employment.

Should a management official 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. The remaining, unresolved disputes are often referred to arbitration. In arbitration cases, an experienced, neutral party renders a binding decision on the issue(s) after listening to advocates and witnesses for both sides.

This article identifies principles used by arbitrators to decide the grievances filed by school employees who were disciplined for their off-duty conduct. The incidents that give rise to discipline are varied and sometimes narrow in scope. Nonetheless, there are unifying feature that are identifiable and principles that appear to be controlling in the arbitral decisions. The authors attempt to give some insight here as to the licit scope of managerial intrusion into the privacy of these public employees.

Cases of legal off-duty conduct found unacceptable by management are examined first, before cases involving illegal off-duty conduct.

DO SCHOOL EMPLOYEES HAVE AN AFFIRMATIVE OBLIGATION TO CONTROL A SPOUSE'S CONDUCT?

The husband of an Oregon school district instructional aide was caught growing marijuana at their home. The aide initially lied to her principal and other teachers about her knowledge of the husband's activity. When the employer found out that she did know about the marijuana, the aide was terminated [1]. There was unrebutted testimony that she neither approved of nor participated in the illegal behavior. She was neither arrested nor charged by the police presumably because they found her testimony credible. The aide grieved the discipline imposed, claiming lack of just cause for her termination.

The employer argued that the aide, as a role model for children, had a responsibility to take action to prevent her husband's illegal activities [1, p. 503]. The arbitrator examined other arbitration decisions and found an appropriate criterion for discharge for off-duty misconduct is whether the conduct had a "demonstrable effect on the employer's business" [1, p. 503]. The employer's

business, in this context, is to provide teachers who act as positive role models for the children they teach and supervise. So the arbitrator did not challenge the authority of the district to take action against an aide or teacher who grew marijuana, that is to say, one who exhibited bad conduct.

The arbitrator did opine, however, that an affirmative obligation of the employee to control her family members or report their conduct to the police is another matter. Any such affirmative obligation would have to be, at the least, expressly conveyed by the district to its employees [1, pp. 504-505].

The arbitrator appears to have relied heavily on the school district's history of not disciplining employees because of off-duty convictions for driving under the influence (DUI) of intoxicants. In the instant case, then, the arbitrator held there was insufficient cause to discharge the aide, but allowed a one-day suspension for her brief lies.

DO SCHOOL EMPLOYEES HAVE PROTECTED FREE SPEECH RIGHTS WITH RESPECT TO THEIR PUBLIC EMPLOYERS?

An Ohio school teacher attended a public meeting of the school board that employed her. At that meeting she blurted out an utterance that directly contradicted her school superintendent. The teacher was issued a written reprimand for her public behavior. She grieved the discipline, and her case eventually proceeded to arbitration [2].

In this 1994 case, the factual circumstances of the utterance were of some significance. The superintendent had stated that the district would save $39,000 by not filling a teacher position. The grievant immediately responded, "No teacher makes $39,000!" Importantly, the comment was either not heard or was ignored by most people at the meeting; the utterance was not disruptive. However, arbitration testimony indicated that the teacher's utterance was factually incorrect, and the superintendent had reason to be upset with ostensibly being called uninformed (at best) or a liar (at worst). The arbitrator explained the need to maintain a balance between free speech rights of public employees and the need of the employer to conduct its business.

> No hard and fast rules exist other than to stress that the key is whether the employee's speech touches a matter of "public concern" which is determined by the content, form and context of a given statement. . . . Moreover, even when the speech does touch a matter of public concern, if the speech or activity adversely affects the efficiency, discipline or administration of the public employer, the employee's conduct may still be subject to regulation [2, p. 218].

In this case the arbitrator found the conduct to be "*impolite*" but not serious enough to warrant discipline. There was insufficient nexus between the remark and the job because the teacher's remark did not in fact harm the reputation of the superintendent or the operation of the school district.

The arbitrator did note that free speech protections may be limited by a public employer when the remarks concern some aspects of the speaker's employment. Specifically, "when the employee's speech deals with personnel disputes or individual grievances, it will not be protected" [2, p. 218].

IS ILLEGAL OFF-DUTY DRUG USE JUST CAUSE FOR DISCIPLINE IF THE EMPLOYEE IS SOBER AT WORK?

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 Minnesota public school security monitor was discharged following a felony conviction for cocaine use. The arbitrator took note of exacerbating circumstances—a history of disciplinary offenses. And, the arbitrator took note of mitigating circumstances—successful completion of the probationary period would cause the felony conviction to be permanently removed from the grievant's record. The arbitrator ultimately sustained the discharge [3, pp. 504, 505, 507].

The facts presented an unusual situation because of the timing of the felony conviction. The employer did not learn of the employee's conviction until approximately ten months after his arrest and conviction. The employee had no discipline problems or any other indications of poor performance during that ten months. The arbitrator used that trouble-free period as evidence of a lack of proof that the off-duty conduct would "cause continuing job performance problems for the District" [3, p. 506]. Similarly, the lack of adverse publicity during the ten-month period belied a claim of reputational harm nexus [3, p. 506].

Nonetheless, the arbitrator felt the grievant could not be rewarded for concealing the misconduct. The arbitrator answered the question, "Would the employer have had just cause for discharge at the time of conviction?" with a response of "yes." He concluded that the district was reasonable, then, in discharging the employee when it did. To the authors it appears that the arbitrator's criterion was, "*Could* the misconduct cause problems on the job or harm to the reputation of the school district," rather than "*did*" the misconduct cause problems or harm."

IS UNSAFE DRIVING WHILE OFF-DUTY JUST CAUSE FOR DISCIPLINE? WHAT IF THE DRIVER WAS INTOXICATED?

A Florida school district issued a written reprimand to a school bus driver who had been issued a citation for careless driving. The offense was in her own vehicle and off duty. The arbitrator, in sustaining the discipline, found a clear nexus between off-duty driving and on-duty driving, stating, "The [school district] would be remiss if it permitted a driver who was found regularly to be careless or negligent in driving his personal vehicle to continue to drive a school but (sic) loaded with children" [4, p. 218]. The arbitrator also noted that the district had a policy that explicitly awarded points based on driving infractions, with point totals triggering various levels of discipline.

An Oregon school district retained four employees with DUI convictions, imposing no discipline. Two were custodial personnel who had no or minimal student contact. One was reassigned from bus driver duties to custodial duties when the driver became uninsurable. And the fourth was, significantly, a teacher who had completed a program of treatment [1, p. 499]. (These incidents did not give rise to an arbitration case, but were cited during another case involving the same employer school district.)

The criminality of the conduct in these cases seemed to be less an issue than the type of behavior and how it relates to the employee's on-the-job responsibilities.

IS OFF-DUTY VEHICULAR HOMICIDE JUST CAUSE FOR DISCIPLINE? WHAT IF THE EMPLOYEE WAS "STONED"?

An Iowa teacher served as both a guidance counselor and a coach. He was convicted of vehicular homicide after a passenger in his car died following injuries sustained when the car left the road. The posted speed limit was 55 m.p.h., while testimony indicated an actual speed between 80 and 120 miles per hour [5, p. 415]. The arguments of both the administration and the union centered on the ability of the teacher to be a good role model for students [5, p. 416-419]. The arbitrator, after considering an extensive number of related cases, stated:

> Had this record consisted only of an off-duty vehicular homicide, without evidence of more wrong doing, I would rule in favor of [the grievant], reasoning that there is insufficient evidence . . . to support management's theory that a teacher with 17 years of good service before the off-duty accident and 14 months of satisfactory service since the incident, is unfit to counsel school children. . . . To the grievant's detriment, . . . [the trial judge ruled the] "State has proven beyond a reasonable doubt that at the time that the

> Defendant was operating his motor vehicle . . . , he was under the influence of an alcoholic beverage. . . . [And the] State of Iowa has established that there was cocaine in the blood sample taken from the Defendant" [5, pp. 419-420].

The arbitrator upheld disciplinary discharge, holding that the "cocaine finding is completely at odds with the notion of teacher as guidance counselor and role model" [5, p. 420]. In the instant case, the illegal drug use by a school employee seems to be the most important single determinative factor considered by the arbitrator.

IS OFF-DUTY GRAND THEFT JUST CAUSE FOR DISCIPLINE?

An Ohio school secretary confessed to grand theft of two Cadillacs. Faced with discharge, a grievance was filed, which proceeded to arbitration. The union presented testimony that the grievant was an exemplary employee whose off-duty conduct had inflicted no demonstrable harm on her employer. The school district advocate indicated that the grievant's conviction was for a highly publicized and serious crime: "It requires no stretch of the imagination to believe students subject to discipline will complain of a double standard if [the grievant] is retained in its employ" [6, pp. 374-375].

The arbitrator took note of the publicity attending the felony, the need of the school district to garner financial support from the public, the direct contact the secretary had with students, and her responsibility to serve as a role model. The arbitrator also noted that Ohio state statute requires revocation of teaching certificates for teachers convicted of felonies. While the grievant was not a teacher, the public policy behind the law, he believed, favored similar treatment of other school employees who have student contact. He denied her grievance and upheld the disciplinary discharge imposed by the school board [6, p. 376].

CONCLUSIONS

The authors' review of arbitration decisions reported from 1989-2001 is not presented as an exhaustive treatment of *all* off-duty conduct disciplinary actions over that time period. Rather, the review covers only cases involving public school employees whose misconduct was off duty, whose case proceeded all the way to arbitration, and whose arbitrator submitted the case to one of the two major reporting services, with subsequent acceptance for publication. Nonetheless, the principles enunciated in the arbitral decisions are instructive.

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 [7]. Public employers are expected to provide a nexus or connection between the off-duty conduct and the employer's legitimate business concerns to show that just cause for discipline is present.

It is well-established that public employees' off-duty conduct is subject to employer scrutiny (and discipline) to a greater extent than similar conduct of a unionized worker in the private sector. Within the public sector, police officers are normally held to a more-rigid standard than others, since they are sworn, uninformed, and armed employees [8, p. 139]. Firefighters, too, are commonly subject to discipline for unbecoming off-duty conduct [9].

School teachers are distinguished from the vast majority of public employees because they are certificated professionals who have grave responsibility for the nurturing of the community's youth. Teachers and school staff who have significant student contact are likely to carry with them the reputation of their employer. Concern about drug use among the young appears to result in little tolerance for school employee abuse; school employees are seen as role models. This stands in contrast to the many noneducational public employees who are referred to employee assistance programs for their abuse.

The Florida case demonstrated a potential risk of physical harm to those in the employer's care, should the employee repeat the same criminally negligent behavior under the similar circumstances that arise on the job [4]. Sometimes, as in Ohio, the state "provides that people holding a teaching certificate who . . . are convicted of a felony are to have their certificate revoked" [6, p. 376]. Sometimes, as in a noneducational case [10], the nexus is shown by explicit policy rules established by the employer, which the union let stand in subsequent collective bargaining. Other times, as in the Westlake, Ohio, case [6], the nexus might be demonstrated by likely or actual harm to the employer's reputation. Another method of showing a nexus to the job, as in the West Monona, Iowa, case, is by demonstrating likely or actual harm to work productivity or work relationships [5].

A criminal conviction is neither a necessary condition (as in one Ohio case [2]) nor a sufficient condition (in precedent referenced in the Oregon case [1]) for a finding of just cause for discipline. But a criminal conviction, *ceteris paribus*, does provide support (as in an Ohio case [6]) for such a finding.

An arbitrator is bound by the contract between the employer and the employees' exclusive representative. In the Eagle Point, Oregon, case, the school district expected a higher standard of conduct than the more general language of the contract and district rules required [1] . A recent noneducational public sector case highlighted the fact that the more specific the contract language is with regard to what off-duty conduct is proscribed, the more likely it is that discipline imposed by management will survive arbitral review [10].

Abuse of substances taken legal and illegally are a significant fraction of the cases reviewed by the authors covering multiple professions in the public sector. Only with school teachers/staff did arbitrators sustain discharge in 100 percent of the illegal drug use cases published. Although the sample was too small to be statistically significant, the small number of such cases reaching arbitration may, itself, signal intolerance for this specific off-duty misconduct. As with other professions, school teachers and staff fared much better in cases involving abuse of legally possessed intoxicants than illegally used intoxicants. The apparent need to set an antidrug example for students outweighs the focus of mutually negotiated disciplinary systems on remedial discipline.

COMMENT

As with the (fictional) Sherlock Holmes case, one of the most striking observations was the absence of a barking dog. In this research, the authors noted the absence of arbitration cases involving off-duty violence—to include domestic violence—by school district employees. This absence is in contrast to the authors' experience with other public employers.

ENDNOTES

1. Eagle Point [Oregon] School District and Eagle Point Association of Classified Employees, *100 Labor Arbitration Reports*. (BNA) pp. 496-508 (1993) (Wilkinson, Arb.)
2. Hicksville [Ohio] Exempted Village Board of Education and Hicksville Education Association, *102 Labor Arbitration Reports*. (BNA) pp. 214-219 (1994) (Talarico, Arb.)
3. St. Paul Public School Independent School District 625 and American Federation of State, County, and Municipal Employees, AFL-CIO, Local 844, District Council 14, *101 Labor Arbitration Reports*. (BNA) pp. 503-507 (1994) (Imes, Arb.)
4. School Board of Orange County, Florida and Orange Educational Support Personnel Association, *108 Labor Arbitration Reports*. (BNA) pp. 216-218 (1997) (Thornhill, Arb.)
5. West Monona [Iowa] Community School District and Individual Grievant, *93 Labor Arbitration Reports*. (BNA) pp. 414-423 (1990) (Hill, Arb.)
6. Westlake City School District and Ohio Association of Public School Employees Chapter 319, *94 Labor Arbitration Reports*. (BNA) pp. 373-376 (1990) (Graham, Arb.)
7. Grief Bros. Cooperage Corp., *42 Labor Arbitration Reports*. (BNA) pp. 555-560 (1965) (Daugherty, Arb.)
8. Town of East Lampeter [PA] and East Lampeter Township Police Association, *105 Labor Arbitration Reports*. (BNA) pp. 133-140 (1996) (DiLauro, Arb.)

9. *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A.2d 82 (PA. 1980) as cited in City of Shawnee and IAFF Local 1628, *91 Labor Arbitration Reports*. (BNA) pp. 93-100 (1988) (Allen, Arb.)
10. City of Evanston, Ill. and International Association of Fire Fighters Local 742, *95 Labor Arbitration Reports*. (BNA) pp. 679-690 (1991) (Dilts, Arb.)

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