

**IS INCARCERATION A GOOD ENOUGH
EXCUSE FOR MISSING WORK?
A SURVEY OF ARBITRATION DECISIONS**

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ABSTRACT

This article examines arbitration cases published since 1992 involving the discipline or discharge of a unionized employee for absence when the reason for absence was the employee's incarceration (in jail or prison). The question addressed by each arbitrator was generally, "Did the employer have just cause to discharge or otherwise discipline the employee for failing to report for work under the given circumstances?"

**OVERVIEW OF THE GRIEVANCE PROCEDURE
COMMON IN UNIONIZED WORKPLACES**

Employers and the unions representing many of their workers typically require just cause for disciplinary measures taken against employees. Those disciplinary measures may include verbal or written warning/reprimand, suspension from work, or even termination from employment. When the union questions whether or not management has exercised good judgement in imposing discipline, the parties typically follow some or all of the steps in an enunciated grievance procedure to resolve the issue. Employee/union grievances are usually reduced to a written complaint. The complaint is discussed at various levels of company management and union leadership until a mutually acceptable resolution is found. In the absence of such a resolution, most private sector collective bargaining

agreements specify binding arbitration over issues unresolved. (Arbitration is the non-confrontational alternative to strikes and is, for that reason, commonly used to settle labor disputes.) Arbitrators are neutrals hired to render a decision after hearing the evidence and arguments presented by both the employer and the union. Many arbitral decisions are published so that others might learn from the experience of the parties and the thought processes of the neutral arbitrators who render judgment.

Overview of Arbitration Outcomes Generally

The Elkouris' seminal work [1] on arbitration of labor grievances surveyed cases of discipline/discharge for absenteeism or absence from work. The decision of management to terminate or otherwise terminate absent employees was sustained in 60 percent of surveyed arbitration cases. Arbitrators sustained the decision to discipline but reduced the level/severity of discipline in another 29 percent of those cases. In the remaining 11 percent of cases, arbitrators overturned the decision of management. Such reversals may have been due to procedural defects conflicting with contract requirements or due to a finding that management did not, in fact, have just cause to administer discipline under the facts of the individual cases [1, pp. 692-693]. This article is not about percentages or wins-and-losses; rather, it's about the actual issues and evidence that the arbitrator weighs in coming to a decision.

Scope of This Article

This article addresses the issue of employee termination for missing work when the reason for missing work is that the employee has been incarcerated. This situation becomes an issue when an employee is jailed and the collective bargaining agreement does not directly address whether or not resulting absences are just cause for termination. Related circumstances are addressed including the term of incarceration and the criminal guilt or innocence of the employee. Additionally, mitigating and exacerbating conditions relevant to just cause determination are examined.

Review of the Literature

The Elkouris' work [1] addressed numerous issues related to just cause, not the specific issue of incarceration. One author who did examine arbitral practice regarding this issue is Roumell. In a published 1992 arbitration decision, he stated that in arbitral decisions followed two divergent paths [2, at 3235-3238]. One path emphasizes the right of the employer to expect regular attendance on scheduled workdays except for unavoidable absence due to illness, jury duty, or other enumerated/customary reasons. Arbitrators who give this concern greatest

weight typically find being jailed to be a poor excuse for missing work and sustain the discharge decisions of management.

The second group of decisions emphasizes consideration of the impact of such absences on the employer compared to absences due to illness, the guilt or innocence of the employee of charges, the seriousness of the charges, and the past period of faithful service to the employer. Arbitrators who give these concerns greater weight typically find incarceration to be a good reason for missing work and reverse the discharge decisions of management.

No clear principles had evolved by 1992 that would make arbitral decisions reasonably predictable to the parties—management and union—based on the facts of their individual cases.

Research Methodology

The author investigated only discipline cases due to absence for periods of incarceration in jail. Cases published since 1992 have been included in order to identify if unpredictability of outcome remains or if a set of principles has evolved over the intervening decade or so that might make arbitral outcomes less unpredictable. Predictability is highly relevant since both union and management representatives exercise discretion as to which discipline cases should be pursued to arbitration. Such discretion is based on the costs of arbitration and the likelihood of prevailing. It is presumed that cases will not generally be pursued that fly in the face of overwhelming precedent.

This article identifies, explains, and presents examples of those unresolved issues in cases of absence due to incarceration. This article also identifies specifics of contract language that might have caused one party or the other to prevail.

PROCEDURAL ISSUES ARISING FROM DISCIPLINE OF THE INCARCERATED

Occasionally parties will prevail in arbitration for reasons other than the wisdom of the decision to impose discipline. Those reasons most typically deal with contractual obligation to follow established procedures when it comes to the administration of discipline in the workplace. This article only deals with those procedural issues that are closely tied to the circumstances of the absence.

Progressive Discipline

The vast majority of collective bargaining agreements call for progressive discipline (as described above) in an attempt to correct unacceptable behaviors. Only the most severe offenses warrant termination as the first step in the disciplinary procedure.

One Louisiana employer argued that it *could not* pursue progressive discipline since the incarcerated field crew member was not at work to be disciplined.

In this case, the employer had witnessed the arrest and knew the employee's whereabouts. The employer clearly could have sent suspension and/or warning notices to the employee's home address (or to the place of incarceration) as required by the union contract. The arbitrator found that this employer had not met the procedural requirements of the contract to issue a warning to the grievant and notice to his union and awarded the discharged employee reinstatement [3, at 882-883].

Justice and Dignity Clauses

Justice and dignity clauses protect an employee from being removed from work before resolution of a grievance. When such clauses are a part of a contract, there are typically enumerated exceptions.

An Alabama employer did not provide justice and dignity protection to a steelworker who was not physically at work due to incarceration. The employer claimed it was not required to do so under the circumstances. The record indicates that the employee called in daily to report his unavailability for work until told not to continue calling on a daily basis. The arbitration board ruled that the employee must be considered actively at work for purposes of the protective clause. Had the employer wanted to exclude employees from protection after a period of a few days or a few weeks absence, it could have included that exception with others in the contract. The steelworker was given back pay because the employer did not have just cause to refuse continued employment until the issue of absence had been resolved. The employee was not reinstated, however, because the union did not pursue the just-cause-for-discharge complaint to arbitration [4, at 655].

EMPLOYER REFUSAL TO GRANT A LEAVE OF ABSENCE TO INCARCERATED EMPLOYEES

Most collective bargaining agreements have provisions for employees to request a leave of absence (LOA). It's common, for example, to have an employee request an LOA to care for family members during a protracted illness.

One hospital services' collective bargaining agreement is particularly illustrative of LOAs. "Any permanent employee desiring a leave of absence from employment shall secure written permission from the Employer. In the case of injuries or illness suffered by the employee or a member of the employee's immediate family, permission shall not be unreasonably denied" [5, at 787].

Granting an LOA is certainly within an employer's discretion. For example, one grievant said that when he was jailed for driving without a license, "he asked for a leave of absence that was granted him" [6, at 550].

Arbitrator D'Eletto addressed the reasonableness of denying leave for periods of incarceration. "The employer's refusal . . . was within its discretion. The

Company is not required by the bargaining agreement to grant leave or special privileges to someone who cannot return to work because of incarceration, or any other unusual circumstance” [5, at 793].

In a case involving a mine operator, another arbitrator said, “I do not believe that an individual’s arrest and incarceration, when such were arguably brought about by his own actions (or lack thereof), provide a basis to hold that Management unreasonably withheld their consent” to a leave [7, at 4057].

In another case, a tire company employee received a prison sentence of 14 months. When he asked the company to “grant a leave of absence . . . for 14 months, *** the manager of human resources advised the Union that the length of time requested was considered excessive, and that the circumstances did not warrant an extended leave” [8, at 7424]. The arbitrator found the company’s denial of the LOA was proper.

In no surveyed article did an arbitral award state a company improperly denied a request for an LOA. In most cases, however, the employee did not request an LOA.

INTERPRETATION OF CONTRACT LANGUAGE AS IT APPLIES TO THE INCARCERATED

Is Absence from Work a “Failure-to-Perform Service?”

Many union contracts include a “failure-to-perform service” among legitimate bases for discipline. Such failure would take place, for instance, when an employee is guilty of sleeping while on the job.

A Louisiana contract provided, in part, that “[f]ailure to perform the service required by the employee’s position” constitutes just cause for discipline [3, at 880]. The Louisiana employer felt that absence for unacceptable reasons was surely a “failure-to-perform service.” The union interpreted the clause as applying only to an employee who is actually at work. The arbitrator adopted the union’s interpretation of contract language as the correct one. Since the incarcerated field crew member was not at work, this clause was inapplicable (according to the decision) to a case of absence to incarceration and did not provide a proper basis for discipline [3].

When management identifies only a single, narrowly framed rationale for termination under a complex set of circumstances, failure to prevail on that rationale undermines what may otherwise be a valid managerial determination. Companies might be better off to enumerate multiple rationales—even if intersecting—to support their position so that rejection of one does not necessarily entail reversal of the entire decision. (Note that multiple rationales that are contradictory cannot be expected to withstand scrutiny.)

Though not addressing that specific contract language, Arbitrator Lundberg apparently takes a contrary view on failure to perform. An employee must show both a “willingness *and ability to perform his obligations* [emphasis added] under a contract when challenging a discharge. Here [the employee] could not possibly perform his work, until nearly a month after his discharge date [9, at 283].

Arbitral decisions might then differ on the applicability of failure-to-perform language in cases of absence due to incarceration.

Is Absence Due to Incarceration “Job Abandonment” or a “Quit”?

Job abandonment is most likely to be adjudged when employees do not advise employers of their absence and intent to return in a timely manner. Arbitrator Thornell noted that the terminated newspaper employee had telephone access while incarcerated but did not advise management of his continued unavailability [10, at 3742].

The Fairweather tome on arbitral practice distinguishes between disciplinary cases where employers must be prepared to demonstrate just cause and cases of consecutive absences which constitute quits and which do not require a showing of just cause [11, at 504]. The Fairweather discussion did not explicitly address incarceration as the reason for absence.

During a period of work-related disability leave, a hospital services mechanic was arrested and incarcerated. This caused his Workers’ Compensation benefits to cease; however, disability leave continued. The company was later notified by the mechanic’s physician that the mechanic’s injury was resolved. The company then terminated the mechanic on the grounds of job abandonment. “The agreement expressly provided that [an employee] would self-terminate in three days if he did not report to work or inform . . . management about his work absence status . . . which [the mechanic] did not” [5, at 788]. The company’s position was that it did not impose discipline on the employee; rather, the employee had self-terminated. The company cited non-binding case precedent. The applicable collective bargaining agreement read, in part,

The rules applicable to employees regarding absenteeism and/or tardiness shall be governed by the mutually agreed No-Fault Attendance policy set forth in . . . this [a]greement. *** An absence of three or more days without any report to management, in the absence of unusual circumstances which made such reporting impossible, will result in self-termination [5, at 787].

The arbitrator’s award reads, “The company was well within reasonable and proper conduct when it declared the grievant’s failure to return to work . . . to be job abandonment . . . and when it determined that he had self-terminated his

employment” [5]. While this case reflects the Fairweather approach, the following stands in contrast.

A Michigan press room helper was jailed for failure to pay fines. The employee was discharged under provisions of the collective bargaining agreement which specified: “Absences for two . . . consecutive work days without reasonable excuse within the two (2) day period shall be considered a quit” [2, at 3230]. In this case, the helper was absent for seven days, and the “incarceration was due to his own dereliction” [2, at 3234]. While the contract language is explicit, a company promulgated work rule allows for a range of disciplinary actions “*depending on the seriousness of the offense in the judgment of management*” [2, the arbitrator’s emphasis]. Taking both the contract and the work rule into consideration, Arbitrator Roumell ruled there was not just cause under the circumstances to terminate. Instead, he reduced the discipline to a suspension without pay.

A Wisconsin educational assistant (i.e., teacher’s aide) missed 26 days of work due to incarceration and was employed under more flexible contract language. “If the education[al] assistant cannot provide an acceptable reason for failing to return to work *** [after being] absent without leave for three (3) or more consecutive days *** [then] he/she shall be considered terminated” [12, at 4773]. In this case, Arbitrator Kessler referenced the Roumell award (infra.) and considered a number of factors. Specifically, Arbitrator Kessler noted the absence of a prior disciplinary record, the petty nature of the (underlying) offense leading to incarceration, and the minimal-to-moderate harm to the employer’s business. He found that absence due to incarceration was just cause for discipline, but he limited that discipline to a 90-day suspension [12, at 4775-4777].

In these two cases, even specific language identifying the appropriate level of discipline for absence were not controlling. The totality of circumstances seem to define the seriousness of the offense and limit the degree of discipline appropriate to something less than discharge.

The outcome of an Alabama steelworker’s case stands in contrast to the two preceding ones. The steelworker was found guilty on felony drug charges. The grievant had given notice before beginning his sentence and reported for work on its completion. He had a good, 20-year work record and had been told by his supervisor that he’d likely get his job back after completing the sentence. The company suspended him pending (a brief) investigation and then discharged the grievant for unexcused absences. The discharge was sustained in arbitration. The difference in outcomes is likely attributable to contract language that “makes it clear that the degree of discipline imposed by the Company is beyond the [arbitrators’] jurisdiction if proper cause for discharge exists” [13, at 583].

Note that explicit contract language sometimes limits the authority of arbitrators to modify the level of discipline once guilt is established of an offense subject to discharge.

Is an Incarcerated Employee Entitled to Sick Leave if Actually Sick?

A water company laborer reported off work on Monday due to the funeral of a member of his extended family. Tuesday, he missed work due to incarceration for driving under the influence. However, he reported off work Tuesday for flu-like symptoms, a claim which he says is factual. The laborer was eventually fired for “improper recording of [his] own work or time record . . .” [14, at 319].

The company and the union had differing opinions about how this case of an employee with dual reasons for absence should be treated. The company contended that whether the laborer was sick or not, he could not come to work so that illness was not the reason he was not at work. The union says the illness is “uncontroverted” and that the company did not avail itself of the option of requiring medical proof during its investigation [14, at 320].

The arbitrator ruled that there was no evidence on the record to indicate that the employee was not sick. The employee asked to use an accrued benefit and was not proved to have falsified his time record. Interestingly, the arbitrator also opined that the laborer missed work for “an impermissible reason [i.e., incarceration] and that [the situation] should have been treated as such under the Parties’ Absence Control Policy with a chargeable offense” [14, at 321]. The arbitrator found the absence unexcused because of incarceration yet found that the employee nonetheless had the right to paid time off for his illness. The company lost this arbitration case because it didn’t fire the employee for his for absence—only for (alleged) falsification of the reason for absence in claiming illness.

ABSENCES UNDER NO-FAULT ATTENDANCE CONTROL PROGRAMS

No-Fault attendance programs discipline employees for having too many absences regardless of cause (except for a few enumerated reasons like jury duty). Such attendance programs relieve management of the onus of disproving a tendered reason for absence, such as for a claimed flat tire. The number of absences tolerated is usually large enough to accommodate the normal exigencies of life.

The grievance of a Pennsylvania employee working under a No-Fault attendance program was denied. The arbitrator noted that the contract provided a narrow list of reasons for absence which are exceptions to the No-Fault Attendance Policy and incarceration was not an enumerated exception [5, at 787].

A California employee similarly failed to have his grievance sustained when the employer had a No-Fault attendance control policy. “[To] consider exception, regardless of how meritorious they appear, would lead to erosion of the program” [15, at 4444].

No-Fault attendance control programs substitute rules for independent determination of just cause. Employers with such programs are more likely to be sustained in their discharge of employees who are absent because of incarceration.

INCARCERATION OF AN EMPLOYEE WORKING UNDER A LAST-CHANCE AGREEMENT

Last-chance agreements are side contracts between the employer and the union regarding a specific employee. Typically, the company has just cause to terminate but wants to give the worker another chance contingent on “cleaning up their act”; quite commonly this means completing a drug/alcohol rehabilitation program addressing the underlying cause of absenteeism. At times, an employee may be arrested while working under such a last-chance agreement.

A steelworker received a last-chance agreement following a one-day absence due to being incarcerated. Approximately one month later, he was arrested, charged, convicted, and began to serve a 30-day sentence. He was released after serving half that term and called his work supervisor. He was told that discipline was forthcoming: a five day suspension converted to discharge. The union grieved [4, at 653]. In this case, the union conceded to management’s termination decision when the steelworker was incarcerated for a second time.

The case of an Illinois employee proved to be an exception. The arbitrator did not find just cause for discharge when the employee was absent due to incarceration. Because of the time lapse between termination and the award, the arbitrator also voided the last-chance agreement and directed the parties to establish a more appropriate set of probationary conditions for the reinstated worker [6, at 555].

Discipline based on “last-chance agreements” is not likely to be overturned by arbitrators. Though the sample of cases involving incarceration is extremely small, this circumstance seems to create more uncertainty than other reasons for violating a last-chance agreement.

LENGTH OF TIME FROM FIRST DATE OF ABSENCE UNTIL DISCIPLINE WAS IMPOSED

A Louisiana field crewman was arrested on July 26 and remained in jail until November 7, more than three months. He was disciplined in mid-October, more than two months after his initial absence [3, at 879-880].

An Illinois worker was arrested on April 15 and released later the next day. The worker missed two shifts while jailed but offered on the 16th to make up that work on the late shift; he was not allowed to do so. He was terminated under a last-chance agreement on April 19 [6, at 547].

A Pennsylvania mechanic was on concurrent disability leaves from May 27 to November 4. He was incarcerated during the overlapping period October 21 to December 28, over two months. The termination/quit was effective November 4, though notice to the union did not occur until November 20 [5].

An Indiana laborer was jailed for one day and terminated later in the month when the company came to believe the reason the laborer had originally given for absence was a false one [14].

An Alabama repairman was incarcerated from July through the following March, a period of more than seven months. He was suspended pending discharge in March when he asked to come back to work; that suspension was converted to a discharge two days later [13].

A Pennsylvania paper worker was arrested at work on October 3 and terminated on October 9 while still in jail [16].

An Alabama worker was arrested on October 23 and remained jailed until November 9. He was suspended subject to discharge on November 9; the discipline was converted to discharge on November 16 [4].

A Wisconsin paper company spare hand was arrested December 1 and released the following January 13. He was discharged on December 15 [9].

There is noticeable variation in the time it takes employers to act on basis of absences due to incarceration. No pattern emerged between the time to imposition of discipline and the substance of the arbitral award.

CONSIDERATION OF POTENTIAL MITIGATING/EXACERBATING CIRCUMSTANCES

Except for the most serious of offenses, the imposition of discipline for just cause requires consideration of mitigating and exacerbating circumstances.

Arbitrator Peterson wrote the opinion for an arbitration board that sustained termination of an employee who had been incarcerated even though the employee had been with the company for 20 years. In the opinion, he noted that collective bargaining agreement did not allow the arbitration board to diminish the level of discipline once it found the employee guilty of a dismissible offense [13, at 583]. While such constraints are hardly unique, they are not the norm. The following cases involved agreements without such a constraint.

A Good Work Record

Union argued that the Louisiana employer did not consider mitigating circumstances—a six-year work record. The arbitrator found that the hearing record reflects a cursory investigation and does not evidence consideration of mitigating (or exacerbating) circumstances [3, at 882-883]. The arbitrator found it was “unjust and inequitable to terminate the Grievant who was confined to jail” [3].

The arbitrator opined in one Wisconsin case that “discipline should be examined in light of such factors as . . . and his prior disciplinary record” [12, at 4775].

A different arbitrator in a different Wisconsin case said that mitigating circumstances—a good work record—would have merited a reduction in the level of discipline imposed in the absence of an aggravating circumstance [9, at 282].

The Nature of the Civil Offense Charged

In the Louisiana case, the record did not reflect employer consideration of the nature of the charged offense—“indecent behavior with minors”—for which the grievant was arrested and jailed from July to November [3, at 879]. Nor did the arbitrator discuss the seriousness of the offense charged when ruling for the grievant on procedural grounds. The author infers the nature of the offense was not considered an exacerbating circumstance.

Arbitrator Kessler distinguished among felonies, misdemeanors, and forfeitures. In the instant case, the employee was jailed for not having paid back fines. The arbitrator found the employee was jailed for “the least serious form of criminal misconduct” and reduced the penalty to a 90-day suspension [12, at 4775-4776].

Drug offenses may be treated as exacerbating circumstances since many employers have a policy of maintaining a drug-free workplace. Arbitrator Teple noted in one case that the general agreement made drug possession, use, or distribution a dischargeable offense whether at or away from work [8, at 7426].

Traditionally, the nature of off-duty offenses are not considered as mitigating or exacerbating circumstances unless the offense is job related or there is another significant nexus to the individual’s employment.

Location of the Arrest

While some employees were arrested at work [3, 10] and others off-site [5, 6, 9], the location did not appear to be an issue to the parties or to the arbitrators. One arbitrator addressed the issue explicitly stating, “Whether he was arrested at work, at home, or some other place is of no consequence” [15, at 4443].

The Impact of the Absence on the Employer

An arbitrator discussing incarceration of a school district employee said that “discipline should be examined in light of such factors [including] . . . the impact it had on the District” [12, at 4775].

During the jail sentence of a press room worker, the company had to pay others overtime to cover his work, and some other work was not completed on schedule. The arbitrator noted that, “There is no showing that [the] absence

affected the Company's operation any more than a routine vacation or absence caused by illness that may last several days" [2, at 3236].

The impact should be contrasted with the impact of absence due to factors other than incarceration. Arbitrators who look at this factor may require a substantial impact before the length of absence is considered exacerbating.

Two arbitrators addressed specific length absences in their decisions to sustain discipline. Arbitrator Teple stated, "An absence of this kind (i.e., unexcused) for a week or two may be allowed under appealing circumstances. *** Any absence going into months, in my judgment, stretches reasonable management expectation of availability for work too far" [8, at 7427]. Arbitrator Lundberg was even less accommodating stating that 14 days was an absence of "unacceptable duration" [9, at 283].

Guilt or Innocence of the Offense Charged

A Wisconsin paper company long ago adopted a policy that addresses this very issue. The company had issued a precedent-setting memorandum almost 20 years before the instant case that explains how the company would deal with absences due to incarceration for crimes that are not crimes against the company or its employees.

If a person is found guilty and sentenced to a prison term, his/her employment with the Company will terminate. If the person is found guilty and given a suspended sentence, it is the Company's position that we should not impose a further penalty by terminating the employment of the person involved. If the courts maintain that the person should be returned to the community, then we feel the Company has a moral obligation to assist the person in becoming a productive member of society. We feel that if a person is confined prior to the final disposition of the case, they should not accumulate seniority during this period of confinement. The question of department seniority will be handled on a case by case basis [16, at 415].

To the company's chagrin, it no longer favored this policy but had failed to rescind it. Arbitrator Duff found the memorandum remained binding and judged an incarcerated employee had been prematurely terminated [16, at 416].

The employee of a different Wisconsin enterprise purposefully violated his parole. An employer might consider arrest for parole violation to impute a higher likelihood of guilt than arrest for "new" offenses [9, at 282]. It is nonetheless interesting that this arbitrator considered the guiltiness of the party arrested, a factor that was not known or proven at the time that the employer made the decision to terminate.

A California employer discharged an employee under its adopted attendance program when the employee missed work due to incarceration following arrest on an outstanding bench warrant. The arbitrator felt that the "weight of evidence falls on the side of the company, who argued that the grievant was in full control of

the disposition of the traffic citation that resulted in his arrest and incarceration which subsequently led to his absence. [The grievant] testified he had two years to resolve the citations but neglected to do so" [15, at 4443]. The grievance was denied.

An Illinois employer discharged an employee who was arrested and later had charges dropped. The arbitrator found the employer had just cause to temporarily suspend the employee until the point when charges were dropped [6, at 555].

A West Virginia employee was arrested on the basis of a warrant which, the arbitrator noted

can only be issued upon a showing of probable cause. *** As such [the] grievant cannot be considered to have had "clean hands" in this entire matter, and thus the absences at issue can be only rightly assigned to him. * * * Finally, the reality of the possibility of [the] grievant eventually being found innocent or having the charges dropped against him unquestionably causes this arbitrator some anxiety, but the parties' Agreement, as written leaves me with no alternative [7, at 4057].

but to deny the grievance.

In many cases, the company acts based on a period of absence without knowing what a final court determination will be. Some arbitrators seem to feel the company should suspend employees until guilt is established. Others do not.

CONCLUSIONS

First, as is true generally in arbitration, in cases surveyed, outcomes are sometimes controlled by procedural matters rather than by the substantive issue that gave rise to the discipline.

Second, no employers were required to give employees a leave of absence, but numerous cases found the employer only had initial just cause to temporarily suspend incarcerated employees. The author is surprised that companies did not regularly assert that denying punishment for absence due to incarceration would be tantamount to saying the company is obligated to approve such LOA requests.

Third, incarceration does not create a failure to perform duties. Absence due to incarceration may or may not be treated as a quit by the arbitrator. There is little to suggest in any given case what the final determination will be.

Fourth, because No-Fault attendance control programs substitute rules for independent determination of just cause, employers with such programs are more likely to be sustained in their discharge of employees who are absent because of incarceration.

Fifth, though enforcement last-chance agreements are generally supported by arbitrators without a further showing of just cause, this survey revealed two cases where the agreements did not stand without a further showing.

Sixth, the time from incarceration to termination varied considerably but with no attributable effect on the final disposition of the grievance.

Seventh, consideration of potentially mitigating or exacerbating circumstances was key to some arbitral decisions, particularly the employee's work record and the guilt or innocence or criminal misbehavior. Location of arrest seemed to play no role in determination of the arbitrators' awards, while seriousness of the offense was sometimes taken into consideration. This author finds consideration of guilt or innocence considerations necessarily imply that management should not take final action, even for a protracted absence, until a final verdict is rendered in court.

The following is a summary conclusion. The outcome of any given arbitration seems to depend less on the facts of the case (absent procedural issues) than the arbitrator selected. This is not because arbitrators appear to be arbitrary, rather because they are faced with two competing concerns in applying the language of the contract—general fairness to the employer's need to operate the business efficiently and general fairness to the employee as framed under just cause. The variability of outcomes is then attributable to collective bargaining agreements that do not contain language pertaining to this specific issue. This is a problem that is relatively unchanged since the period prior to 1992.

Anecdotally, one Wisconsin company had adopted (two decades earlier and since forgotten about) a policy that innocent parties would not be terminated just because they were in jail. A paper worker is lucky that he was terminated quickly—after a week or so of incarceration—for non-availability for work rather than for accumulated absences. Since the company announced its decision to terminate prior to adjudication of the criminal matter, the arbitrator had no choice but to sustain the employee's grievance based on that binding precedent [16, at 414].

RECOMMENDATION

Employers and unions should address absenteeism due to incarceration specifically in their labor contracts if they are unwilling to accept the variability that has continued unabated for decades on the matter in grievance arbitration.

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