

Nexus

Arbitrators often split in off-duty misconduct cases. Take the following case.

The grievant is a delivery driver for a beverage company. He is charged with (and pleads guilty) to conspiring to distribute 3000 dosage units of an illegal drug (ecstasy).

The employer discharged him for violating the rule on "misconduct which casts discredit upon the Company."

The union argues that the incident occurred off-duty and was not work-related, nor did it affect the grievant's performance in any way. No customer ever complained to the company. In fact, the company cannot demonstrate any loss of reputation or profits based on the grievant's misconduct.

The company argues that it cannot risk the company's reputation on a matter as serious as illegal drugs.

Here is a summary of the two arbitrators' views.

Not Uphold the Discharge

This is an all or nothing kind of case. The employer must prove that just cause exists and a key element in that proof is nexus. Nexus is the Latin word for a connection between the off-duty misconduct and the employer's operation. Without proof of that element, an arbitrator cannot uphold the employer's penalty. In other words, a suspension is no more valid than a discharge.

One arbitrator at a recent conference put this point succinctly: I have to set aside whatever I think about drug-use or selling, and decide whether there is a nexus. Did it have any connection to the job? No. End of case.

From another perspective, the issue is whether the misconduct casts discredit upon the company. The arbitrators in this camp answer that question also in the negative. First, he was not selling from the company's truck. Second, he was involved in a conspiracy to sell off-duty. If the company discharges him under this rule, the company has to prove that discredit has taken place. It cannot make a bald assertion of loss of reputation or profits.

However, the company is not without recourse - at least as to future cases. It can re-write the rule to cover the conduct which offends them. One such rule could cover any conduct which leads to a felony conviction. (But note that California, and perhaps other states, limit by state law what employers can do to employees who are on their own time and off-premises.)

As to this grievant, the arbitrators in this camp would reinstate with full backpay.

Uphold the Discharge

In the other camp are arbitrators who look as closely as possible to find a nexus. Such factors may be the size of the drug bust and what publicity it has garnered. Another may be the grievant's job duties and the proximity of the sales to his delivery route. Still another factor may be whether the employer has evidence of drug use on premises by

other employees, and ties which the grievant may have to it.

In other words, these arbitrators will give as much weight as jurisprudentially possible to evidence (past, present or potential) that indicates the grievant's actions have or will cast discredit upon the company.

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