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Making an Article 35.1 Defense

EAP Participation, Rehabilitation Counter Discipline for Substance Abuse

Unfortunately, alcohol and drug abuse are widespread problems in America. According to the National Institutes of Health, more than 17.5 million adults are alcoholics or have alcohol problems. And a 2003 study estimated that 19.5 million Americans aged 12 or older were current users of an illicit drug. So it should come as no surprise that letter carriers, like every other occupational group, are sometimes affected.

Workers who abuse alcohol or drugs often have problems on the job. Shop stewards who see a letter carrier's work performance or attendance record worsening can urge employees to seek help through EAP or other treatment programs.

However, early intervention is not an option for an arbitration advocate defending a carrier already disciplined for alcohol or drug abuse. By the time the advocate enters the picture, management has already suspended or removed the employee, for intoxication on the job, or for other misconduct related to the substance abuse.

When management's evidence is strong, even a skilled advocate may have difficulty saving the job of a letter carrier in this situation. And when the facts supporting the charge are well-established, the union may be limited to arguing for mitigation of the penalty.

Management's "Automatic Removal" Argument

When a letter carrier is found to be intoxicated on the job, management usually bypasses lesser disciplinary options and goes straight to removal. This is true when the case involves intoxication alone, or when the carrier commits other misconduct while under the influence, such as a vehicle accident. Managers often insist that removal is their only alternative in these situations—because, they argue, of this language in Article 16.1:

> ***Section 1. Principles***
>
> *In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage,* ***intoxication (drugs or alcohol),*** *incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or dis-*

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> *charge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.* [Emphasis added.]

Managers tend to focus on the highlighted language naming "intoxication (drugs or alcohol)" as an example of just cause. Ignoring the rest of the paragraph, they conclude that where the facts show intoxication, that alone is sufficient to prove just cause. In other words, intoxication "automatically" equals just cause for discharge.

This management position is wrong. The JCAM makes this clear in the explanation under Article 16.1 (p. 16-3):

> ***Examples of Behavior.*** *Article 16.1 states several examples of misconduct which may constitute just cause for discipline. Some managers have mistakenly believed that because these behaviors are specifically listed in the contract, any discipline of employees for such behaviors is "automatically" for just cause. The parties agree these behaviors are intended as examples only. Management must still meet the requisite burden of proof, e.g. prove that the behavior took place, that it was intentional, that the degree of discipline imposed was corrective rather than punitive, and so forth. Principles of just cause apply to these specific examples of misconduct as well as to any other conduct for which management issues discipline.*

Some managers believe, incorrectly, that Article 16.1 provides "automatic" just cause for certain offenses.

So NALC should have argued early in the grievance procedure that management has the same burden to prove just cause in alcohol and drug abuse cases as in any other disciplinary action. However, if that argument has not been raised explicitly, all is not lost.

If you raise this issue at the hearing and management challenges it as a "new argument," you can argue, first, that the issue of just cause is inherently present in every disciplinary case. So long as the grievance has challenged management's action under Article 16.1, it is hardly a "new" matter to raise any of the several burdens which Article 16.1, and the related JCAM material, places on management in every discipline case.

Second, the JCAM's preface states in its second paragraph:

> *At each step of the grievance/arbitration procedure the parties are required to jointly review the JCAM in order to facilitate resolution of disputes. The JCAM may be introduced in arbitration as dispositive of those issues covered by the manual. . . .*

An NALC advocate can argue that the parties consider the JCAM so essential that it must be used at all steps of the grievance procedure—including arbitration. What is more, when the JCAM covers an issue, it may be introduced in arbitration as the final word on the matter. ("Dispositive" is legalese, meaning "final word.")

Your job is not finished, of course, when you establish that management still needs to prove it had just cause to remove a carrier for alcohol or drug abuse. In many cases management has all the evidence it needs to prove intoxication, or misconduct while intoxicated. Management may have little difficulty in meeting its burden of proving just cause. Are you dead in the water? Maybe not.

The Article 35 Defense

If the grievant has sought help from the Employee Assistance Program (EAP), either before or after the incident, you still may be able to argue that management erred by failing to consider the grievant's treatment, rehabilitation, and chances

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for improvement in the future.

If the grievant has taken advantage of the benefit EAP has to offer you may have a strong defense, but it will require some very specific strategies. Article 35 will be the door to your defense. Article 35.1 provides:

> ***Section 1. Programs***
>
> *The Employer and the Union express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor-management cooperation shall support the continuation of the EAP for alcohol, drug abuse, and other family and/or personal problems at the current level.*
>
> ***An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings.*** [Emphasis added.]

If your grievant has participated voluntarily in EAP for assistance with drug or alcohol abuse, then management is required by Article 35 to consider this factor "favorably" in disciplinary action proceedings. The union argument in such a case is that management must show it gave the grievant the favorable consideration to which he or she was entitled. Management may have difficulty proving this, especially where it has learned of the grievant's EAP participation, but nonetheless refused to reduce the discipline in earlier steps of the grievance procedure.

Your Article 35 defense will focus on the word "favorably." Management may have difficulty showing "favorable" consideration when it refused to reduce the level of discipline.

Your Article 35 defense will focus mainly on the word "favorably." The dictionary definitions for the word "favorable" include: advantageous, encouraging, indicating future success, or indulgent. Obviously, there is no benefit in arguing the Postal Service should be indulgent of substance abuse. However, Article 35 does require managers to consider the grievant's EAP participation as a mitigating factor. The union should argue that EAP participation is indicative of a successful change of behavior in the future, and must be counted to the grievant's positive credit.

An Affirmative Defense

When you employ this strategy—arguing the employee participated voluntarily in EAP, yet was not given favorable consideration—you present an affirmative defense. An affirmative defense is one offered to limit, excuse, or avoid culpability or liability, even where the factual allegations of the moving party are admitted or proven. The party making an affirmative defense says, in effect, "Yes I did it, but . . ." In the case of intoxication or misconduct under the influence, the union argues, "Yes, the grievant did it, but he or she also participated in EAP voluntarily and management must count that in his or her favor by reducing the discipline." Success in this defense results in mitigation of the penalty; it is not a "Get Out of Jail Free" card.

Making an Article 35 EAP Defense

In making an affirmative defense under Article 35.1, the union alleges facts that go beyond those claimed by management. So the union bears the burden of proof in making that defense.

Under Article 35.1, the union must show simply that the grievant has participated voluntarily in EAP. However, that's just the

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beginning. In this type of case, the advocate must help the grievant convey some very sensitive and personal details of his or her life to the arbitrator.

This will involve many challenges. For instance, often the grievant has more baggage than a single intoxication charge. He or she is likely to be an alcoholic or dependent on drugs.

The grievant should tell a clear, concise story of acknowledgment, treatment through EAP, and recovery.

Experienced advocates are used to dealing with grievants who present difficulties. Sometimes grievants refuse to level with their advocates. Others may have broken the rules, yet refuse to admit they are wrong. And some people are simply poor witnesses for a variety of reasons.

Alcoholics and drug-abusing grievants often present a much greater challenge. They have made life choices which may have unknown and serious underlying causes. They may not have admitted their dependency—preferring denial to facing their problems. For some, avoiding both the truth and their own responsibility has become way of life.

The advocate must establish open and honest communication to succeed with such a grievant. Your witness preparation will play a large and essential role in the case.

Preparation Before the Hearing

To succeed with an alcoholic or drug-dependent grievant, you—the advocate—must limit yourself to advocacy. Remember, you are a union representative rather than a counselor or therapist. Stick to your task: Zealously represent the grievant and avoid judgment.

When you are making the Article 35 affirmative defense, it is important to establish at the outset which facts are true and which are not. For instance, if the charge is reporting to work intoxicated, confirm with the grievant that he or she did report under the influence. Determine what was consumed or ingested—for example, a six-pack before work, a late-night drinking binge prior to a work day, or smoking pot before work. The grievant must testify to these facts.

If the grievant admits an alcohol or substance abuse problem, he or she must acknowledge this fact at the hearing. While the grievant may find that difficult, a forthright admission will be essential to convince an arbitrator to reduce the discipline. The advocate should go over this difficult testimony with the grievant several times prior to hearing. Practice will help the grievant remain calm and collected during the hearing. If the grievant's acknowledgement at the hearing is overly emotional, the arbitrator may have reservations about his or her emotional stability.

To prove its affirmative defense, the union must show the grievant sought rehabilitation through EAP. The grievant can make a favorable impression on the arbitrator by telling a clear, concise story of acknowledgment, treatment through EAP, and recovery. The story should include:

- Acknowledgement of the dependency;
- What incident prompted the grievant to contact EAP;
- When he or she first contacted EAP;
- What referral or other help was obtained;
- What regular meetings or counseling the grievant attended;
- What positive benefits resulted—the grievant's record of sobriety;
- Whether the grievant has continued the counseling or meetings; and
- What commitment the grievant is making to turn his or her life around and return to work as a productive employee.

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Here is a short example:

Madame Arbitrator, I knew I had a problem with my drinking. I still do. I would wake up and take a drink to steady my nerves and get ready to face the day and there was no stopping. I called the EAP counselor and she met with me several times. I have been attending a local Alcoholics Anonymous meeting, sometimes every day when things get rough. I can't drink, I know that now. It isn't easy, but I have a sponsor and I'm working on staying sober. EAP has helped me find help. I recognize that I will always be a recovering alcoholic, but now I've gone two months without a drink and I intend to keep up the fight. I want to return to work and show that I can be a productive employee.

To bolster the grievant's testimony, the advocate should provide strong corroborative witnesses. Often the steward or other witnesses can attest to the grievant's voluntary EAP participation. EAP counselors cannot testify because of strict confidentiality rules. Alcoholics Anonymous (AA) sponsors also follow a code of confidentiality. However, the advocate may get the sponsor to testify if both the grievant and sponsor agree to waive confidentiality.

The advocate should also prove that either NALC or the grievant told management about the grievant's EAP participation. It will be difficult to demand "favorable consideration" if management had no idea the grievant had contacted EAP. In most cases the union will have communicated this to management at some point during its consideration of the discipline, either before the discipline was issued or later, during discussions in the grievance procedure. The shop steward who handled the grievance at Formal Step A should be able to testify that he or she told management about the grievant's voluntary EAP participation. An advocate can also ask management witnesses to confirm the facts of this communication.

Fortunately, many arbitrators made an exception to the usual rule and admitted post-discipline evidence of rehabilitation.

Timing of EAP Participation

In some cases a grievant has participated in EAP before receiving discipline for intoxication on the job or misconduct while intoxicated. In many cases, however, the grievant first contacts EAP after receiving the discipline. Sometimes a shop steward first learns of the grievant's abuse problem when the carrier is removed; the steward then encourages the carrier to seek help through EAP.

The timing need not be a major problem in your arbitration case. Many arbitrators recognize that people struggling with substance abuse tend to remain "in denial" and avoid seeking treatment until they "hit bottom"—that is, until a major catastrophe occurs in their personal lives. Getting fired is often that catastrophic event, triggering the grievant's first steps on the road to recovery.

An interesting evidentiary question arises when NALC submits evidence of a grievant's EAP participation and recovery after the discipline is issued. In a usual discipline case, NALC would object strongly if management tried to introduce post-discipline evidence of misconduct to justify discipline. Management may well point this out to a arbitrator, and object to NALC's introduction of any evidence of events occurring after the discipline was issued.

Fortunately, many arbitrators have recognized the relevance of the rehabilitation that often takes place after discipline for substance abuse. They have carved out an exception to the usual evidentiary rule, and permitted such evidence in arbitration to show treatment and recovery. Usually, the union must argue that such evidence is admissible for the purpose of de-

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termining the appropriate remedy.

Management also may argue that its favorable consideration applies only to "disciplinary action proceedings." That is, management must give such consideration during the pre-disciplinary phase, when it is deciding whether to issue discipline. So, USPS may argue, that consideration does extend to either grievance discussions or arbitration.

In response, a union advocate should argue that "disciplinary action proceedings" do not end with the issuance of discipline. The arbitration hearing, as well as prior grievance discussions, should be considered part and parcel of those proceedings.

In some cases, the grievant sought treatment through a private hospital or other provider, rather than through EAP. Management may argue that Article 35.1 gives no protection in these circumstances.

The union can counter by pointing out the first sentence of Article 35:

> *The Employer and the Union express strong support for programs of self-help.*

An advocate can argue that this language represents the parties' clear endorsement of all programs that offer treatment for substance abuse—and not just those programs offered by EAP. It follows that a grievant who skips EAP and instead checks into a hospital for substance abuse treatment is equally entitled to consideration in discipline.

The Hearing

The order of the hearing is the same in all discipline cases—management is the first to open, the first to present its case-in-chief, and the first to close. This is no different in a case of discipline for intoxication on duty, in which the union makes an Article 35 EAP defense.

Once the union shows the grievant participated in EAP, management takes on the burden of showing it gave the grievant the favorable consideration required by Article 35.

Because management goes first, the union advocate's first objective is to establish certain facts while cross-examining management's witnesses. The employer advocate typically will spend considerable time leading management witnesses through the events and elements of the charge.

- What happened on the day in question?
- How did the grievant act when he or she clocked in?
- Did he or she appear to be intoxicated?
- What did you do then?

You should listen carefully to determine if the management version of the story matches the file and what the grievant has indicated in your pre-hearing preparation. If the elements of the manager's testimony are essentially accurate, then your focus will be the affirmative defense. If management tries to paint a picture not supported by the file and your own understanding, you should correct the record in your cross-examination.

Say, for instance, that a manager embellishes by testifying that the grievant was belligerent and combative, but there is nothing in the file to substantiate this claim. On cross, ask the manager to repeat the claim:

> *During your testimony you indicated the grievant was combative and abusive, is that correct?*

The manager will either confirm the prior testimony or grow wary and backpedal. If the manager sticks to the allegation, your own witnesses will provide contradictory testimony. If the manager backpedals, so much the better. In either case you will raise a question about the management witness's credibility. Poor management credibility can help the union's case in many ways.

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While catching inconsistencies can take some of the sting out of management's case, this is not the primary focus of your cross-examination. The key is the manager's "favorable" consideration of the grievant's EAP participation.

One fact you should extract from the management witness on cross is whether he or she was aware of the grievant's participation in EAP. During your cross, it is important to show that management knew of the grievant's EAP participation. Simply ask the question or refer to the file to establish this fact.

Shifting the Burden

When you use an Article 35.1 affirmative defense, your central goal is to establish that (1) the grievant has participated in a substantial way in EAP and has achieved benefits as a result, and (2) management knew of that EAP participation. Once you establish these facts, you shift the burden of proof on the Article 35 issue to management. Because Article 35 directs management to "favorably consider" the EAP participation, the union can press management to produce evidence of that favorable consideration.

The union must begin this task during cross-examination of management witnesses who took part in the issuance of discipline or in grievance discussions that followed. The union advocate should ask such a manager if he or she is aware of the provisions of Article 35.1, and if so, whether this grievant's voluntary participation in EAP influenced his or her decision regarding the discipline. If the manager gave the EAP participation no consideration at all, then USPS directly violated Article 35.

The manager more typically will acknowledge that he or she gave "consideration" to the grievant's EAP participation. However, seldom will the employer have acted in the grievant's favor as a result—either by issuing lesser discipline at the outset, or by offering to reduce the penalty in grievance discussions. The union advocate should get the manager to state on the record that while he or she did consider the matter, he or she did not act to lessen the discipline. This places management in a difficult position; with the burden shifted, it needs to show that it gave the "favorable consideration" required by Article 35.1. Absent any concrete action in the grievant's favor, proving this will be difficult for management.

The grievant's testimony should convince the arbitrator that he or she is profoundly changed.

An alert management advocate may sense danger here and try to rehabilitate the witness on the issue of favorable consideration. Pay close attention to the manager's testimony on redirect. Be prepared to challenge inconsistencies or any management attempts to introduce new arguments or evidence.

Union's Case-in-Chief

Once management rests its case, you have a very straightforward case to present. The grievant's direct testimony should be humble, forthright, and aimed squarely at the arbitrator's sense of decency. Clear, simple questions and answers will be most effective.

If the charge is true, the grievant should admit it without flinching. He or she should acknowledge the intoxication and state whether he or she is a recovering alcoholic or drug abuser.

The grievant also must give a detailed account of his or her efforts to seek treatment and rehabilitation through EAP. The testimony should give the arbitrator a clear picture of a grievant who went to EAP, accepted the advice given, entered counseling or treatment, and continued to participate and turn his or her problem around. As discussed earlier, if the grievant did tell management about the EAP participation, the arbitrator should hear about it.

Finally, zero in on the central facts that arbitrators want to

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hear. These matters are deeply personal and often painful, but no arbitrator will put the grievant back to work without hearing the right answers to these kinds of questions:

- Have you stopped drinking or abusing drugs?
- Are you continuing in some sort of ongoing counseling or recovery program?
- Do you want to go back to work?
- Do you understand why your behavior was inconsistent with what is expected in the workplace?
- Will you commit to doing the job right and avoiding a repitition of the behavior that led to the discipline?

Finally, ask the grievant if he or she has anything else to add. This may be the most important part of the grievant's testimony. The grievant should speak directly to the arbitrator, expressing remorse for past behavior, acknowledging his or her disease, and showing a mature commitment to continued rehabilitation, staying substance-free, and returning to productive employment. If the arbitrator cannot be convinced the grievant has made a profound change in his or her life, the Article 35 defense may not be successful. This is why it is so important to prepare the grievant to speak clearly and directly and most of all, honestly, to the arbitrator.

In your closing, focus on the grievant as a human being who has made a commitment to turn his or her life around.

Closing the Deal

Your closing argument should be as focused and concise as your direct case presentation. Argue that you have shown beyond doubt the grievant's substantial and voluntary participation in EAP. Argue that Article 35.1 is mandatory—it states that " . . . voluntary participation in the EAP for assistance with alcohol and/or drug abuse ***will be considered favorably*** in disciplinary proceedings."

Focus on the meaning of "favorable consideration," pointing out that while management may have given ***some*** consideration to the grievant's involvement with EAP, it must do more: It must show it gave ***favorable consideration***.

Argue that management can hardly claim it favored the grievant in any way if it refused to alter the degree of discipline. Point out the various definitions of "favorable"—advantageous, or indicating future success—and argue that management gave no advantage to the grievant, and took no action indicating that the EAP participation might help the grievant do better in the future. Tell the arbitrator that management has given nothing but lip-service to Article 35.1—empty words that do not amount to compliance with the contract.

Make sure the arbitrator understands that the burden of proof on this issue has shifted to management. It is management that must provide convincing evidence that that it counted the EAP participation in the grievant's favor.

Finally, focus on the grievant as a human being. Point out how the grievant has faced the demons of substance abuse, come to grips with the truth of dependency, and started on the long, hard road to recovery. Emphasize that the grievant has testified honestly, participated in EAP, continued with counseling, and made a commitment to turn his or her life around. Tell the arbitrator that when the parties wrote Article 35, they intended to give employees like the grievant another chance. Ask the arbitrator to enforce that agreement between the parties. ■

Arbitral Views of the Article 35 Defense

Views Vary, But Most Seek a Compelling Personal Narrative

All advocates know they need to research prior awards to prepare for their arbitration hearings. Our own research revealed a wide range of views among arbitrators who have ruled on discipline for impairment and the Article 35.1 defense.

Keep in mind that the Article 35.1 defense is based mostly on a single sentence, which provides little detailed guidance for an arbitrator:

> *An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings.*

Because the contract does not define "favorable consideration," this key phrase is open to interpretation. And although that consideration is triggered simply by "an employee's voluntary participation in the EAP," in practice arbitrators usually require an employee to do far more than simply participate in EAP before they will consider reducing the discipline.

So an advocate should research previous awards thoroughly, making sure to check for decisions written by the arbitrator who will hear the case. This article reviews some important lessons from prior cases in which NALC used an Article 35 defense to discipline for alcohol or drug abuse.

In a 1975 case arising in Venice, California, the Postal Service removed a letter carrier for operating a vehicle while under the influence of alcohol, for verbally abusing and using profane language to a supervisor and coworkers, for grabbing a coworker by the arm, and additional offenses. (#RA-699D-73, C-02846, Arbitrator Benjamin Aaron, May 19, 1975). The grievant had been disciplined for similar behavior in the past. Nonetheless, Arbitrator Aaron accepted the union's argument that the grievant was a recovering alcoholic, and ordered the Postal Service to reinstate the employee and give him one more chance.

Arbitrator Aaron commented insightfully on the nature of such cases, which may involve unacceptable behavior and an unsympathetic grievant struggling with a powerful disease:

> *This is a very important case, not only because of the profound effect the decision will have on the grievant's future employment, but also because of the implications it will have on the administration of the Postal Service's PAR program.*
>
> *As is true in so many important cases in law as well as in arbitration, the grievant or protagonist is not a very attractive person. His behavior on 6 June 1974 was absolutely outrageous, and his prior offenses in 1971 and 1972 reflect the same pattern of violence and abusive language.*

(Note that the USPS Program for Alcoholic Recovery, or PAR, was an earlier form of he current, and much broader, EAP program. PAR was focused primarily on alcohol abuse.)

More than 30 years ago, Arbitrator Aaron was well-informed enough to call alcoholism a disease.

> *But it is also true, at least as of 6 June 1974, that the grievant was a sick man, suffering from the disease of alcoholism. A study of the record in this case permits no other conclusion. Whether [the Grievant] suffered a true "blackout" on 6 June, or whether he subsequently claimed to have done so to make his case more appealing, is irrelevant. So is the amount of liquor he ingested at lunch. The incontrovertible fact is that when he returned to the Venice Post Office after lunch on that day he was "under the influence" and not in control of himself. The*

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> *same condition existed when he made his telephone calls to Poster later that day. * * **

Arbitrator Aaron also placed some blame on postal managers, who had known of the grievant's drinking but done nothing about it.

> *The most troublesome part of this case is the attitude of [the Grievant's] superiors to the administration of the PAR program. As previously indicated, the program places primary responsibility on supervisors to detect signs of alcoholism in employees and to try to involve them, in the program. It is inconceivable to me that [the Grievant's] drinking problem could have gone unnoticed for the entire period from 1971-72; yet his supervisors did absolutely nothing about it. . . .*

The arbitrator also declared that given its PAR program, the Postal Service was obligated to give an alcoholic employee a chance at rehabilitation before applying discipline—unless the employee was guilty of assault or depredation of the mails. He made this ruling under the old PAR rules.

Please note that today's EAP program ***does not*** provide that kind of protection from discipline. The EAP rules in ELM Section 870 provide in part:

> ***871.12 Alcohol or Drug Abuse***
>
> ** * * EAP is not intended to alter or amend any of the rights or responsibilities of postal employees or of the Postal Service itself.*
>
> ** * **
>
> ***871.32 Limits to Protection***
>
> *Although the employee's voluntary participation in EAP counseling for alcoholism or drug abuse should be given favorable consideration in disciplinary action, participation in EAP does not limit management's right to proceed with any contemplated disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct. Further, participation in EAP does not shield an employee from discipline or from prosecution for criminal activities.*

Note that today's EAP program does not prevent management from issuing discipline for alcohol or drug abuse.

Significantly, Arbitrator Aaron was impressed by the employee's credibility and insight into his own disease. The grievant recognized that he had to stop drinking and that recovery would require a difficult, daily struggle.

> *One can understand this failure—to a degree; [the Grievant] fits the standard definition of a "hard case." Like a number of other alcoholics, he has frequently behaved in a disgusting manner. On the other hand, I was impressed by his candor and intelligence. He demonstrated a mature insight into his problem. He has overcome the most difficult obstacle: recognition and acceptance of the truth that he is an alcoholic and that he cannot drink at all. At the same time, he eschewed extravagant claims about his ability to cope with the problem; he refused to accept the suggestion of his counsel that he had his drinking problem under control, saying only that "you can't control it . . . You just go day to day." He volunteered that there were a lot of times when he wanted a drink, and that even when he was attending AA meetings, he "slipped" twice.*

In another early case, Regional Arbitrator Marshall J. Seidman faced a grievant removed for throwing away third-class circulars. Although local managers were aware the grievant was intoxicated at the time,

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and other evidence indicated he had drunk more than a quart of liquor, the USPS advocate claimed the grievant had been sober. #C8N-4T-D 33242, C-01928, February 22, 1982.

Arbitrator Seidman, noting that intoxication did not immunize a grievant from removal, looked at other arbitrators' decisions and set forth a list of "the factors which would allow an arbitrator to mitigate the offense committed" and order an employee reinstated:

> *First, that the act was done while the grievant was an alcoholic and at the time the act was committed he was either drunk or under the influence of alcohol;*
>
> *Second, that the grievant's prior work record is either relatively clear of disciplinary action or that all, or most, of the prior disciplinary actions occurred as the result of the grievant's alcoholism;*
>
> *Third, that the grievant is successfully participating in, and that participation has caused both his counsellor and the officer in charge of the P.A.R. program to indicate that he is likely to be a successful candidate for rehabilitation; and*
>
> *Fourth, that the grievant has had a substantial length of Service with the Post Office, generally for a period of at least 10 years, with the likelihood of reinstatement increasing if the period of prior service is 20 years or more.*

Even in early cases, arbitrators showed real understanding of the psychology of substance abuse.

While Arbitrator Seidman's formulation is not controlling, a number of other regional arbitrators have quoted it approvingly or followed its general logic. (Please note that, as explained in the companion article on intoxication cases and the Article 35 defense, EAP counselors follow strict confidentiality rules and will not testify in arbitration.)

Arbitrator Seidman also discussed the nature of alcoholism, quoting an earlier decision by Regional Arbitrator Dash, as follows:

> *An alcoholic, like a mentally unbalanced person in need of psychiatric care, is often the last person to realize that he needs outside, professional help to solve his problems . The alcoholic's addiction is often not realized by him until something drastic happens in his life. But when it does happen, and he voluntarily seeks the help that he should have sought much earlier, it does not contribute to his rehabilitation to conclude that his delay is fatal to his voluntary attempts to gain his self-respect. Quite to the contrary, the defeat of an alcoholic employee's attempts to straighten out his life and prove his ability properly to perform the job he knows best by closing the door forever to his reinstatement to such job can make a perpetual bum of such a person, something the parties obviously do not expect to encourage in view of their understandings as expressed in Article XXXV of their Agreement.*

#NC-E-7910-D, C-02831, Arbitrator G. Allan Dash, Jr., December 19, 1977.

In another award, Arbitrator Dash explained at length the nature of alcoholism as a disease and the psychology of alcoholics who eventually seek recovery. He addressed the alcoholic's world view, persistent state of denial, and the phenomenon of "hitting bottom:"

> *A.A. members are usually aware of a specific occasion in their drinking history upon which they "hit bottom." That is, they arrive at a point where their loss of control over their drinking gets them into an untenable situation. This could take the form of a major automobile accident, the loss of a job, the separa-*

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> *tion from their family and/or divorce from their spouse, etc. Most A.A. members agree that it was necessary for them to experience such a traumatic occurrence in order to come to the realization that something must be done about their drinking problem if they are ever to become normal human beings.*

#AD-E-11.3.0-D, C-00854, July 18, 1979.

NALC advocates may find this award worth quoting to explain why a grievant may have contacted EAP and begun rehabilitation only after receiving serious discipline. This issue has been controversial among arbitrators.

In a more recent case, Arbitrator David Dilts returned a letter carrier to duty despite numerous disciplinary actions for attendance-related incidents which culminated with a discharge for coming to work under the influence. #EO1N-4E-D 04196956, C-25874, April 15, 2005.

When confronted with the prospect of removal, the grievant went to EAP and sought help for his alcoholism. In returning the grievant to duty, Arbitrator Dilts ruled:

> *In this Arbitrator's considered opinion, Article 35, in conjunction with the grievant's 19 years of service are sufficient to require that he be given one final chance to remain sober and salvage his Postal career. Therefore, in this Arbitrator's considered opinion the grievant's removal must be ordered reduced to a long suspension.*

It is notable that a heightened blood alcohol level was the grievant's only offense in the case; he had not driven a vehicle or committed any other misconduct on the job while under the influence. The union also showed that the grievant had drunk alcohol only the day before, while off duty. Because the grievant was an alcoholic and suffered from both cirrhosis of the liver and Hepatitis C, the alcohol had failed to metabolize and instead remained in his system, so that he came to work the next day still under the influence. In sum, it appeared the grievant's only offense was unintentional.

Although Arbitrator Snow faulted a grievant for seeking rehabilitation only after receiving discipline, other unfavorable facts overshadowed the case.

In less favorable circumstances an Article 35 defense may fail. For instance, in a 1982 case heard by Regional Arbitrator Carlton Snow, a letter carrier was charged with (1) using intoxicating beverages while on duty and in uniform and doing so in a public place while in the company of others; (2) failing to provide security for the mail; and (3) giving false and misleading information to cover up his misconduct. #W1N-5H-D 2804, C-01340, July 23, 1982.

After a lengthy discussion of alcoholism and whether the grievant was in fact an alcoholic, Arbitrator Snow discussed the timing of the grievant's seeking intervention:

> *The grievant did not assert alcoholism as a defense until after the incident had occurred. He had been informed on January 28, 1982 of management's intention to remove him. The grievant first seriously advanced his defense of alcoholism on February 8, 1982. This occurred almost two weeks after he had received the Employer's notice of an intention to remove him. Other arbitrators have given little weight to an employe's efforts at alcoholic rehabilitation when those efforts suddenly surfaced after management had taken disciplinary action and the Employer had no objective reason to be aware of the alleged malady. (See, for example,* Armstrong Furnace Company, *63 LA 618.)*

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Note, however, that the weight of other evidence did not favor the grievant. Arbitrator Snow commented that, for example: (1) there was insufficient proof that the grievant was an alcoholic at the time he drank beer while delivering on a mounted route; (2) the evidence did not show the grievant was drunk at the time; (3) the grievant had not suffered from the usual memory problems of alcoholics; and (4) the grievant had made a "carefully calculated effort to hide his drinking from full view" by moving his jeep. In these circumstances, Snow concluded:

> *The charge . . . is serious enough to justify the grievant's removal. His misconduct involved more than a mere breach of work rules. He consumed alcoholic beverages while engaged in his work as the driver of a postal jeep. He exposed himself and the general public to substantial safety hazards.*

In some cases, however, the union can prevail even where an employee has been charged with serious misconduct. Arbitrator Nicholas Duda, Jr., decided such a case in 1994. GTS #12871, 12872, C-14086, December 14, 1994. (The arbitrator did not receive a GATS number in the case.)

Duda's case involved the removal of a letter carrier for opening a parcel on his route. Management knew the employee was having difficulties and had sent him to EAP some time prior to the incident, but at the time it occurred the grievant was not participating in EAP. With the realization that he was likely to be removed, the grievant admitted to having a crack cocaine problem and entered an EAP program. Interestingly, even though the grievant had authorized EAP to release information about his participation, EAP was not forthcoming with that information.

Grievant's Participation in Rehabilitation

The EAP counselor's log is clear proof and verification that Grievant and the Union strenuously sought evidence from the EAP and therapist providers about his participation in the rehabilitation programs. Not until a few days before the scheduled arbitration hearing would "The C.A.R.E. Center" give Grievant any written proof. Although they had said they would come to the arbitration hearing, they changed their mind at the last minute, apparently because of policy and legal considerations. Even the EAP counselor would not show the log of EAP notes despite Grievant's "release" and approval, until she checked her Company's Management and legal counsel. The written evidence presented at the hearing from "The C.A.R.E. Center" about Grievant's participation reflected the most outstanding progress through EAP this Arbitrator has seen for a person in Grievant's situation. Grievant's own demeanor and testimony were similarly persuasive.

Arbitrator Duda did not fault a grievant for delaying his EAP participation and rehabilitation, where the grievant's story was otherwise believable and compelling.

Arbitrator Duda made clear that both the EAP evidence and the grievant's own testimony had made a strong, favorable impression on him, even though the grievant began his rehabilitation in earnest only after USPS had removed him:

> *The Parties "express strong support for programs of self-help." Here the Employer referred Grievant to the program it provides. Initially he did not participate with com-*

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mitment. Later Grievant came to embrace, participate and appreciate the program. In a sense he is a shining example of the value of EAP. This Arbitrator cannot believe the Employer intends to stop its "strong support" toward a troubled employee singly because he does not enthusiastically embrace EAP services immediately when ordered or offered.

Grievant came to express a strong commitment and intention to maintain his rehabilitation and now promises to fulfill all of the Employer's regulations if given an opportunity for reinstatement.

* * *

Under these circumstances Article 35 of the Agreement requires that Grievant's voluntary participation be favorably considered to mitigate against removal.

This award illustrates the very personal, individual nature of cases involving discipline for alcohol or drug abuse. When faced with such cases, arbitrators try to ascertain the quality of the grievant's character, looking for solid signs of sincerity, remorse for past behavior, and a mature, realistic commitment to work toward rehabilitation. As explained in the companion article in this issue, this means advocates should spend extra time preparing the grievant to testify effectively.

Remedy

Arbitrators have a vast array of remedies at their disposal, and in cases of drug or alcohol abuse, an arbitrator will often fashion a remedy giving an employee one more opportunity to prove his or her worth as an employee. Often this takes the form of a "strict compliance" or "last chance" remedy.

Regional Arbitrator Claude Ames crafted a strict and detailed "last chance" remedy in an award that sustained the union's Article 35.1 defense:

Notwithstanding the Agency's reservations about whether the Grievant has demonstrated sufficient remorse to be entitled to reinstatement, under Article 35, the evidence record indicates that Grievant has taken the positive initiative while off work to address his drug abuse problem. On November 6, 2006, he voluntarily entered a chemical dependency program four days a week, from 6:00 to 9:00 p.m., and successfully completed the program on January 10, 2007. He is currently in an after care program and has tested negative from November to February 28, 2007 for alcohol and drugs. The Grievant understands that the burden and responsibility rest with him to remain drug free and continue to correct his behavior. He has indicated his willingness to do so.

Arbitrators who sustain an Article 35.1 defense sometimes impose a "last chance" remedy on the grievant.

Last Chance Agreement:

In light of these continuing and positive self-help initiatives undertaken by the Grievant and consistent with Article 35, the Arbitrator finds that the Grievant should be given favorable consideration in the form of a Last Chance Opportunity at his job and personal rehabilitation. Accordingly, the Grievant is ordered placed on a Last Chance Agreement as follows:

1. The parties are to meet and confer to agree upon the terms of the Last Chance Agreement (LCA).

2. The LCA should include a verifiable requirement that Grievant continue, for a period of one year, a weekly chemical dependency after care program at Aurora Charter Oak Behavioral Health Care.

3. The LCA should also include a verifiable require-

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ment by Grievant to submit and undergo a weekly drug test as a condition of continued employment for a period of one year. Both the cost of the after care chemical dependency program and weekly drug testing shall be borne by the Grievant.

4. Violation of any verifiable drug after care or testing requirement will result in the Grievant's removal from Postal employment.

5. The Grievant is required to offer a formal apology upon his return to work to Station Manager Sanfilippo and Supervisor's Ochoa and Abbinanti for his inappropriate and unprofessional conduct towards them.

6. The Arbitrator shall retain jurisdiction over this case for sixty (60) days to resolve any questions regarding implementation of the Last Chance Agreement.

#FOIN-4F-D 007035961, C-27061, April 17, 2007.

This award sent the grievant a very strong message of "no more tolerance." Arbitrator Ames left the grievant no room for error; even a temporary relapse would cause the grievant to forfeit his employment.

While last-chance remedies are common when an Article 35 defense succeeds, union advocates should try to prevent an award or agreement with conditions this stringent. Under these conditions, an aggressive manager could try to remove a grievant merely for showing up an hour late to a drug test. Moreover, a last chance agreement should never waive the right to grieve and challenge the just cause of future discipline, either explicitly or by implication.

In a substance abuse case, advocates should try to prevent a "last chance" award that either undermines future grievance rights or imposes extremely stringent conditions on the reinstated grievant.

Moreover, a "zero tolerance" condition is ill-suited to a grievant attempting to recover from the disease of substance abuse. Union advocates may benefit from expert testimony explaining that many people experience relapses along the road toward successful recovery. (In fact, expert testimony may be needed in any case where the advocate's research indicates that an arbitrator could benefit from some education about substance abuse.)

Arbitrator Aaron implicitly recognized this in C-02846, quoted earlier, when he complimented a grievant for his "candor and intelligence" and "mature insight" into his problem. Aaron was impressed that while the grievant had admitted his problem and committed to stop drinking entirely,

. . . he eschewed extravagant claims about his ability to cope with the problem; he refused to accept the suggestion of his counsel that he had his drinking problem under control, saying only that "you can't control it . . . You just go day to day." He volunteered that there were a lot of times when he wanted a drink, and that even when he was attending AA meetings, he "slipped" twice.

Arbitrator Aaron clearly understood that while a successful recovery is never absolute, nor even assured, sometimes the contract, and the simple decency it embodies, dictate than an employee be given a real chance to attempt it. ■

Cumulative Index

Note on Citations. C-number arbitration cases are available on the NALC Arbitration DVDs. New national awards are available at http://www.nalc.org, under Departments>Contract Admin> Arbitation. M-number Materials Reference System materials are available on the NALC Contract CD and on the website under Contract Admin>MRS. All materials are also available from the offices of the National Business Agents.

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