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Last Chance Agreements: Shape Up or Ship Out

by Barry E. Simon

I. Introduction

In the past fifteen years, employers and unions have made increasingly greater use of agreements designed to give an employee who engaged in conduct that would otherwise warrant dismissal an opportunity to remain employed, subject to certain conditions.[1] These agreements, known as "last chance agreements," have generated a body of arbitral decisions that offer guidance as to their creation and enforcement. As with any analysis of arbitration awards, the reader must consider that arbitrators often differ with one another in their decisions. Unlike court decisions, arbitration awards are binding only upon the parties to the case. As to other parties, they may be persuasive but they are not precedential.

This article was inspired by a panel chaired by the author at the 2005 Fall Education Conference of the National Academy of Arbitrators. Comments by the management and union advocates on the panel, and more particularly by the Academy members in the audience, reflect that there are few, if any, universally accepted principles in the creation and enforcement of last chance agreements. The purpose of this article is to make the reader aware of where those differences of opinion lie. The author also refers the reader to two excellent articles on this subject by Kenneth Grinstead and Donald J. Petersen.[2]

II. Creating the Last Chance Agreement

Consider the following three scenarios and what they have in common. In Scenario 1, a long-term employee with a good employment record engaged in a verbal altercation with a supplier who complained to the employer about the employee's attitude. Generally, such conduct would warrant discharge, but the employee explained that he had just learned that his father was terminally ill and something the supplier said hit a raw nerve. The employer understands that this conduct was totally out of character for the employee.

In Scenario 2, a ten year employee developed an attendance problem. At least once a week she arrived ten to thirty minutes late. She accrued ten one-day absences in the past three months, for which she was disciplined three times. She was finally dismissed for not returning to work after lunch without notifying her supervisor. During the handling of her grievance, the union business agent reported that the employee admitted to him to being an alcoholic and that she had begun attending AA meetings. This condition, which she want to get under control, was the underlying cause of her attendance problems.

In Scenario 3, a truck driver with two years of service failed a random drug test when his urine tested positive for marijuana. His supervisor called him in to discuss the results of the drug test, and the employee asked that his union steward be present. The supervisor told him that he didn't need his steward and refused to make the steward available. The employee told his supervisor that he was at a party over the weekend where marijuana was used. At the end of the meeting, the supervisor fired the employee. The union grieved and argued that the dismissal was flawed because the grievant was denied his *Weingarten* rights.[3]

Each scenario presents an opportunity for a resolution that will prevent or settle a grievance and correct the employee's behavior. This resolution is generally referred to as a "last chance agreement" (LCA), even though it might not necessarily be agreed upon. The LCA typically is an acknowledgment that the employee committed an offense that would ordinarily warrant discharge, but circumstances dictate that a lesser penalty be imposed with the understanding that future offenses of that nature would, with certainty, result in

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discharge.

Employers enter into LCAs for numerous reasons. For example, the employer may prefer to retain an employee who may benefit the employer if the employee is rehabilitated. In some cases, such as Scenario 3, the employer may feel that dismissal might not be upheld in arbitration, but may wish to lay the groundwork for a more supportable discharge the next time the employee misbehaves. Employees and their unions may accept LCAs because they desire to maintain the employment relationship. Even when the union believes it could overturn the dismissal in arbitration, it might urge the employee to accept an LCA at an early stage of the grievance process because it would be a safer option and, if it offers immediate reinstatement, would minimize the employee's losses.

Because the LCA most often is preceded by the employee's dismissal, the employer should ensure that the agreement settles all claims arising from the dismissal. In addition to a grievance under the collective bargaining agreement, the dismissal may have created a cause of action under some statutory provision, such as an equal employment law. In the agreement, the employee should explicitly waive any claim of any nature arising from the dismissal. Where such a waiver is obtained, a large employer should be sure that all persons who might handle employment related claims are aware of the waiver.

Last chance agreements are most typically used in cases involving absenteeism or substance abuse. In these cases it is clear what the employer is attempting to accomplish and it is fairly easy to set specific objective requirements that the employee must meet to remain on the payroll. Where the employee has attendance problems, the LCA might establish a maximum number of absences allowed during a specified time period. The LCA may explicitly state that any absence above the maximum will result in dismissal.[4]

In substance abuse cases, the employer may direct the employee to be evaluated by a counselor and comply with whatever treatment recommendations are made. To ensure compliance, the LCA may require the employee to submit to unannounced drug or alcohol testing. Any positive test or failure to submit to testing would be grounds for discharge. Some cases present hybrid situations, where attendance problems stem from substance abuse or other disorders, and are not merely a reflection of poor work habits or attitudes. In such circumstances, the LCA may describe a course of treatment, and make the employee's compliance with the treatment program a condition of continued employment.[5] In any case, the LCA should clearly describe the conditions that the employee must satisfy to retain an employment status, or those circumstances that will warrant discharge. LCA conditions for an employee with a substance abuse problem might read as follows:

1. Within ten days of the date of this agreement, the employee will schedule a meeting for an evaluation by the Employee Assistance Program counselor. The employee will agree to a treatment program as prescribed by the counselor.
2. The employee will participate in any rehabilitation programs prescribed. If in-patient or out-patient programs are prescribed, the employee will successfully complete them. If attendance at a twelve-step program is prescribed, the employee will attend as frequently as directed by the counselor. The employee will meet with the counselor at prescribed intervals.
3. The employee will refrain from using alcohol and drugs other than those prescribed for him by a physician.
4. The employee will submit to urine and/or breath testing at times directed by the employer. Any positive test or refusal to submit to testing will be considered a violation of this agreement.
5. Any violation of these conditions within two years of the date of this agreement will result in the employee's immediate discharge.[6]

Stating that the failure to comply with the terms of the LCA *will* result in dismissal truly creates finality. Even though the agreement uses the term "last chance," if it states only that the employee *may* be dismissed, the agreement will give an arbitrator discretion as to the quantum of discipline. The vague language im-

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plies the employee will be subject to discipline, up to and including dismissal. In one case, where the LCA stated that any violation "will result in disciplinary action, up to and including termination," the arbitrator reduced a dismissal to a three day suspension, the penultimate step in the disciplinary progression, finding that the employee's failure to clock in and out was not an egregious violation.[7]

Arbitrators sometimes face last chance agreements that are not really last chances. When the employer tells the arbitrator that the employee has already failed to live up to an earlier last chance agreement, questions are raised as to what the instant LCA means. Is it a final last chance or just another next-to-last chance? When an employer chooses not to discharge the violator, the employee might be given a false sense of security, thinking either that the employer has acquiesced to poor performance or has waived the right to discharge under the LCA. One arbitrator explained:

> If the employee who is subject to the LCA violates the LCA and is consequently terminated, she had proper warning. If the employee violates the LCA and nothing happens, the notice provisions of the LCA are diluted and the employee must again be put on notice that additional violations will subject her to termination. Without such a requirement, an employer would be free to "strike" anytime.[8]

Management may respond to this argument by asserting it exercised leniency by giving the employee greater latitude than the LCA required. If that is the case, the arbitrator may consider how, if at all, that was communicated to the employee. Management may also argue that it granted an employee additional absences before invoking the LCA as insurance against a finding that one or more of the absences should not have been counted against the employee. This argument may be persuasive, but only to a limited extent. For example, if the LCA may be invoked after five absences, but the employee has accumulated twenty before being dismissed, the employer may have over-insured.

III. Parties to the Agreement

Last chance agreements are enforceable in the same manner as the collective bargaining agreement.[9] Rarely will an arbitrator find an LCA to be unenforceable, but certain standards have emerged. First, the LCA should be signed by an employer representative, a union representative and the employee. The employee's signature would counter any argument that the employee was unaware of the agreement or its terms.[10] The union should be a party to the LCA because some arbitrators consider an LCA to be an amendment or supplement to the collective bargaining agreement. Arguably, the execution of an LCA to which the union was not a signatory constitutes direct dealing or indivividual bargaining with the employee, which is an unfair labor practice. In a case where the employer had denied the grievant's request for union representation, an arbitrator, citing *J. I. Case v. NLRB*,[11] refused to enforce the LCA and held, "These special agreements are proper only when undertaken under the auspices of the collective bargaining process."[12]

From a practical standpoint, the union's participation in the execution of the LCA makes the union a partner in working with the employee to ensure compliance with the agreement's conditions. Because the union generally favors an LCA as an alternative to an employee's dismissal, it has a vested interest in the employee's success in meeting the conditions of the LCA. In a work environment where LCAs have not been successful in rehabilitating employees, the employer may become reluctant to agree to them. The union's role at this stage is to ensure that the conditions imposed by the LCA are reasonable rather than onerous. The representative also has a responsibility to make sure the employee understands the conditions, as well as the consequences for failing to meet them.

Some arbitrators reject the argument that the LCA is a supplemental agreement. The union representative, then, need not be the one vested with the authority to bargain the master contract. For example, in one case, an arbitrator dismissed the union's argument that the LCA was invalid because the International was party to the contract and the grievant had been represented in negotiating the LCA by the president of the local rather than an international staff representative. The arbitrator held:

> The purpose of the Union's involvement in the signing of a Last Chance Agreement is to ensure that the Grievant's due process and other rights are observed, to ensure that the Grievant's interests are represented, and to assist the Grievant in obtaining a clear understanding of the LCA. Any competent Union officer, Steward, Vice President, President, or Union staff representative can fill this role.[13]

Because many LCAs arise out of the grievance procedure, it may be sufficient that the agreement be signed by any representative who has the authority to resolve grievances.[14] Where employees are permitted under the collective bargaining agreement to progress their own grievances, at least to the first step of the grievance procedure, they should be able to enter into an LCA as a grievance settlement without union involvement. An agreement that does not involve the union,

however, cannot modify the specific terms of the collective bargaining agreement. For instance, the employee may not waive the grievance and arbitration provisions of the CBA. The union, on the other hand, is free to agree to contractual modifications with respect to individual employees.

While disparate treatment is not normally a valid argument on behalf of an employee terminated under an LCA, it is not unusual to hear the union argue that another employee should not have been dismissed because management gave last chance agreements to similarly situated employees who engaged in similar misconduct. Many LCAs state they set no precedent for future discipline cases and may not be cited in other proceedings. Arbitrators typically respect such provisions and do not consider other employees' receipt of LCAs to have established a past practice.[15] Such a clause, however, might not be effective in another forum, such as an equal employment proceeding. It is binding in labor arbitration only because the union is a party to the agreement.

IV. The Right to Grieve

Although courts have recognized the right of the parties to execute agreements that waive the employee's grievance rights,[16] there is a presumption favoring the arbitrability of grievances arising from disciplinary actions. Accordingly, any waiver of the right to arbitration must be clearly and expressly stated in the LCA. By agreeing that a discharge under an LCA is not arbitrable, the parties are effectively making the employee a probationary employee with the employer having sole and unlimited discretion to terminate the employee. Not only has the employer eliminated the employee's right to challenge the quantum of discipline imposed, but it has also removed the right to challenge the merits of the discipline, *i.e.*, whether the employee failed to meet the conditions of the LCA. Consequently, it should be established that the employee and the union knowingly consented to such a waiver.

Most arbitrators, though, reject any condition in an LCA which forfeits any right of the grievance procedure, assuring the grievant a "day in court," and require the employer to prove that the employee violated the LCA.[17] In addition to arbitrators adhering to the concepts of fundamental fairness and due process, arbitrators look to the source of their jurisdiction over the grievance and their authority as arbitrators. That authority is derived from the grievance/arbitration provisions of the collective bargaining agreement, and not the LCA.[18] Therefore, arbitrators may be more likely to find the general provisions of the grievance procedure to be controlling.

Employers, aware of the fragility of their position that the right to grieve may be waived, may be reluctant to pursue such an argument. For example, in one case, an LCA condition read, "You agree not to file any grievances, lawsuits or claims of any nature against the Company which in any way relate to a discharge action as a result of this agreement." Despite this language, the employer argued, against the Union's position that such language rendered the LCA void and unenforceable, "Under the last chance agreement, the arbitrator's authority is limited, and only extends to a determination of whether the grievant violated a company rule or standard." Undoubtedly because the employer was not challenging the arbitrability of the grievance, the arbitrator upheld the company's position that his jurisdiction was limited rather than non-existent.[19] Because of this prevailing trend among arbitrators, employers would be best advised not to make a waiver of the right to progress a grievance through arbitration a condition of an LCA.

V. Duration of the Agreement

In his article, Donald J. Petersen tabulated the duration clauses of the agreements cited in the arbitration cases he reviewed. Noting that not all of the cases mentioned time limits, he found that a one year or six month term seemed to be preferred. Of the fifteen agreements he was able to review, seven had a life of one year, three were for six months, and there was one each for ninety days and two years. Two of the agreements were effective for a "reasonable" period of time and one had no expiration.[20]

In the author's experience, the duration of a last chance agreement is generally related to the underlying reason for the LCA. In attendance cases, the objective is to develop better habits for the employees. Sometimes a review of the employee's attendance record may indicate patterns that might influence the duration of the LCA. For instance, with an employee whose absenteeism increases during the summer (such as on days the Cubs are at Wrigley Field), an agreement that encompasses that period of time would be appropriate. Recognizing that arbitrators rarely, if ever, see those instances where an LCA has been effective in correcting employee behavior, it has been the author's observation that many agreements with attendance requirements are breached by the employee in the first couple of months of the agreement. It is not unusual, though, for an employee to maintain satisfactory attendance for an extended period of time, and develop problems only toward the end of the agreement.

LCAs originating from substance abuse problems tend to have longer durations. Typically, such agreements follow a discharge for use, possession, or being under the

influence of drugs or alcohol. Some, however, may be the result of a dismissal for absenteeism or other performance related problems where the root cause is a substance abuse problem. Many of these agreements require the employee to enter a rehabilitation program and maintain a level of participation in a program such as Alcoholics Anonymous. The employer may also require random unannounced testing to ensure the employee is maintaining sobriety. An LCA in these instances would run long enough to encompass a period of sobriety that might be indicative of success. In industries that are particularly safety sensitive, such as railroading, it is not unusual to see agreements that subject the employee to random testing for three to five years.

In rare cases, the LCA may extend for the term of the employee's career with the employer. Scenario 1 may be a good case for such an agreement where the type of conduct engaged in by the employee is never tolerated. The purpose for extending the LCA would be to establish that the employee was on notice that the conduct constituted a dismissible offense and that leniency had already been exercised once by the employer. It may also be used to circumvent a contract provision that limits the employer's referral to prior discipline to a specified period of time. Where, for instance, the collective bargaining agreement prohibited the employer from referring to prior disciplinary actions more than three years old, the arbitrator held that the LCA was a condition of continued employment rather than "a personal record of disciplinary action."[21] Others arbitrators, however, have held that the term of the LCA must be reasonable, and not eternal.[22]

Upon the expiration of the LCA, the employee rarely starts with a clean slate. Unless otherwise prohibited by the collective bargaining agreement, the last chance agreement may provide a basis for supporting discharge under the principle of progressive discipline. Where an employee had again tested positive for drugs after his one year LCA had expired, the arbitrator held that the agreement was evidence of notice to the employee that he could be discharged for drug use. The arbitrator did not find it "reasonable to conclude that the grievant has a 'free pass,' after the expiration of the last chance agreement, to resume his drug usage."[23]

In the absence of a termination date, one arbitrator determined he was required to construct a reasonable termination date for the LCA. Finding it gave him the best guidance, he applied the parties' contract provision that written warnings remain in effect for twelve months if there is no subsequent discipline.[24]

VI. Arbitral Review - The "Just Cause" Standard

While last chance agreements are entered into with the hope that they will never need to be enforced, many employees find themselves discharged again and before an arbitrator who is called upon to determine if the discharge shall be upheld. The first question before the arbitrator is the extent to which the arbitrator's authority has been limited by the LCA. When considering discharge cases, the issue before the arbitrator is commonly whether the grievant's dismissal was for just cause. The "just cause" standard is often stated explicitly in the collective bargaining agreement, but even if it is not, it may be implied in some cases.

The concept of just cause has existed for more than half a century, and has been defined by many arbitrators, most famously by Carroll R. Daugherty's "seven tests."[25] While many arbitrators have rejected the "seven tests" approach, there is a general consensus that to establish just cause the employer must prove some demonstrable reason for imposing discipline. That reason must concern the employee's ability, work performance, or conduct. Inherent in the definition of "just cause" are also certain concepts of industrial due process. The discipline must be proportionate to the offense and consistent with discipline imposed upon employees with similar records.

Arbitrators have debated whether just cause is superseded by the LCA, or whether the standard remains. A leading treatise comments:

> *Relationship to the "Just Cause" Requirement.* Depending on its wording, the agreement may or may not replace the just cause requirement. Because the just cause requirement is so fundamental, an arbitrator should not, without express language, presume the parties intended to abandon it. If the agreement does replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last-chance agreement itself and determining whether the employee actually violated that agreement.[26]

As a middle ground, some arbitrators takes the approach that just cause continues to be the standard by which we will judge the discipline assessed against the employee, but the parties, through the LCA, have defined certain elements of just cause.[27] For instance, instead of measuring the appropriateness of the discipline against how other employees with comparable work records have been treated for similar offenses, the LCA defines the discipline for this particular employee for this particular offense.

Most large employers have formal rules of conduct for their employees. Likewise, work procedures may be codified. A typical disciplinary arbitration will include the employer's proof of

what behavior or performance is either required or proscribed, and further evidence that this was known (or should have been known) by the grievant. The employer will then set out to prove that the employee did not behave or perform as required.

The prevailing view is that the LCA sets out a special code of conduct for the employee and gives notice of what is expected. As noted above in the example of an LCA for substance abuse, there may be standards of conduct that are not imposed upon other employees, such as complete abstinence from alcohol. By accepting the LCA, the grievant and the union have agreed that the grievant may be treated differently from other employees with respect to the discipline imposed for infractions covered by the LCA. In exchange for foregoing severe disciplinary action or discharge, the employer receives an unequivocal promise that the employee will meet special terms and conditions of employment.[28] Thus, arbitrators have held that an LCA supersedes an employer's attendance policy.[29]

While some arbitrators have stated they would examine the conditions imposed upon the employee and decline to enforce them if they were unduly harsh or onerous, most arbitrators would be unlikely to do so if the LCA was agreed upon by the union. One arbitrator wrote:

> As a general rule arbitrators support programs of salvage and rehabilitation by strict enforcement of such last chance agreements in accordance with the terms that the parties, including the employee, have been willing to accept. However harsh or strict such terms may be and even though the arbitrator might well regard such conditions as unfair, that should not be his concern. Once the arbitrator starts substituting his judgment for that of the parties, he has exceeded his authority and, more importantly, has jeopardized the future use of such agreements for such employees. . . .
>
> An employer who has been willing to forego assertion of its right of termination for just cause in return for a strict and absolute agreement of this nature would be extremely reluctant to take the chance on such an agreement in another case if arbitrators would not give full recognition to such agreements. For this reason, last chance agreements are entitled to as much respect as the collective bargaining agreement itself.[30]

Where the arbitrator unquestionably has authority is the issue of whether the LCA was violated by the grievant. The employer has the burden of proving that at least one of the conditions was not met, thereby triggering the penalty provision of the LCA. The employee, then, has the opportunity to show that the conditions were satisfied, *e.g.*, one of the absences counted by the employer was covered by the Family and Medical Leave Act. The grievant's defense, though, may be limited. For example, arguments which may be available to mitigate the severity of the discipline in a typical just cause grievance may be unavailable in a grievance arising under and LCA. One arbitrator wrote:

> The last chance agreement gives the arbitrator no authority to apply equitable principles which arguably, in a just cause discharge might excuse grievant's misconduct. A last chance agreement is, in essence, the parties' agreement defining what is just cause in respect to the grievant.[31]

Except where the LCA is less than emphatic that a violation will result in discharge, as discussed above, arbitrators are reluctant to modify the discipline imposed by the employer. Finding the LCA to be a "schedule of penalties that was mutually agreed to," one arbitrator held any consideration of the discipline imposed to be beyond his authority.[32] The same arbitrator wrote in another case:

> In my years as an arbitrator I have never sustained a discharge, nor can I recall reading the decision of any other arbitrator sustaining a discharge, over what seems to me such a mild display of irritation. In many, if not most, organizations such a minor outburst would pass without any discipline whatsoever. . . .
>
> However, in this case, the last chance agreement removes from me the authority to ask whether the conduct involved is sufficiently serious to warrant a termination, if the last chance agreement applies to the conduct involved.[33]

The arbitrator's first obligation is to be true to the parties' agreements. Arbitrators have no authority to amend or ignore the terms of the collective bargaining agreement, including agreements in the settlement of grievances. Where an arbitrator considered the grievant's "long years of seniority" and reinstated him subject to conditions substantially identical to the LCA, the Sixth Circuit reversed the district court and remanded the case with instructions to vacate the arbitrator's award.[34] The court wrote:

> [D]id the arbitrator have the authority to disregard the explicit terms of the prior settlement agreement reached by the parties? The district court held that the arbitrator properly ignored the settlement agreement because the parties did not contemplate that the settlement agreement would constitute an amendment or addendum to the collective bargaining agreement. Because the settlement agreement did not amend the collective bargaining agreement, the argument goes, the arbitrator retained his authority to determine whether the penalty imposed by the employer under the settlement agreement was too harsh. . . .
>
> Parties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own

construction.

When a party claims that a prior settlement agreement controls the parties' obligations, the policy in favor of the finality of arbitration must yield to the broader policy in favor of the parties' chosen method of non-judicial dispute resolution.[35]

Arbitrators must assume that every agreement between management and the union is the result of an arm's-length negotiation. Because both sides have alternatives, such agreements cannot be considered the product of duress or coercion. This is as true for agreements settling grievances as it is for contracts. A grievant complaining that he was coerced into signing the LCA because the employer threatened to fire him is no different than the criminal defendant insisting he accepted the plea bargain because he faced a longer sentence if he went to trial. In both cases, a decision was made to accept certain consequences. The fact that the alternative was to risk greater consequences does not negate the decision.

VII. The Last Chance Award

Not all last chance conditions are the product of negotiations between the parties. Many times, the arbitrator will reinstate an employee with the admonishment that this is a "last chance" for the employee to demonstrate she can comply with the employer's rules; another way of saying, "Go forth and sin no more." Some may be more specific, saying, "Any repetition of this violation will result in discharge."[36] While such conditions are more often found in cases where the arbitrator has held that dismissal was excessive and the employee is reinstated without back pay, there may be circumstances warranting last chance conditions even though the discipline is totally rescinded. In a case where the employee was charged with a drug-related offense, the arbitrator found no basis for the dismissal and reinstated the grievant with full back pay. Because of the employee's drug history, however, the arbitrator imposed a drug testing requirement for two years, stating that the failure to pass or take a test would subject the employee to immediate discharge.[37]

Conditions imposed by an arbitrator often lack many of the elements of an LCA, particularly specificity as to what conduct is required or prohibited, a reasonable and finite duration to the conditions, and certainty as to the consequences for future violations. Consequently, such arbitral language will not likely be given the same weight as a last chance agreement by a subsequent arbitrator. It may serve the purpose, though, of letting the employee know that future infractions could seriously jeopardize continued employment. Thus, it may provide the same type of "wake-up call" that management and the union try to achieve through the LCA. Additionally, it may let a subsequent arbitrator know that the employee has already been given a stern warning, but to no avail.

In other cases, the arbitrator may impose conditions in the same manner as the parties might have done.[38] While arbitrators may not consider themselves bound by conditions set by a previous arbitrator, they may accept the logic that the arbitration award is just as much a part of the collective bargaining process as the contract and grievance settlement agreements.[39]

In one case, the arbitrator did not impose last chance conditions, but directed the parties to do so. That case involved poor performance by a grievant who had long tenure and was given mixed messages about his performance. The arbitrator reinstated him without back pay

on a last chance basis, that he is being given a final warning with stated consequences, should he fail to satisfactorily perform consistently. . . . The final letter of warning is to summarize, with specifics, where continued and sustained improvement is required in his job performance. The letter should go on to state that if he fails to show immediate and substantial continued satisfactory work performance, he will be subject to termination. It is to be made clear to [the grievant] that this is a last chance for him to prove . . . that he can consistently bring his level of performance up to that of the requirements of the job. In connection with the final letter of warning, [the grievant's] performance should be monitored and reviewed periodically. Where necessary, the result should be communicated to [the Business Representative] of the Union.[40]

The decision to impose last chance conditions in a reinstatement award is not always an easy one. On the one hand, the arbitrator may consider that the management and union representatives have known the grievant much longer than the day or two spent with the arbitrator. The advocates are experienced negotiators and could have settled the dispute with a last chance agreement if they felt it was appropriate. Some advocates may even prefer the arbitrator to sustain or deny the grievance unconditionally.

On the other hand, the advocates may have felt that a last chance agreement was the best resolution, but were unable to persuade the grievant or management and are looking to the arbitrator to validate their positions. Because offers of settlement are not normally heard in arbitration proceedings, this would not be known to the arbitrator.

VIII. Conclusion

The last chance agreement is an effective tool of discipline and grievance resolution. To enhance the

effectiveness of the LCA, the parties should ensure that the terms of the agreement are reasonable and appropriate to the situation, clear and unambiguous, and fully explained to the employee. Both management and the union have a responsibility to work with the employee to ensure compliance with the LCA's conditions, thereby maintaining the employee's continued employment relationship.

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Notes

1. A comparison of the two most recent editions of Elkouri and Elkouri, *How Arbitration Works* illustrates the increasing popularity of these agreements. The fifth edition, published in 1997, covered last chance agreements in only two paragraphs. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 920 (Marlin M. Foltz & Edward P. Goggin eds., 5th ed. 1997).The sixth edition, published in 2003 expanded coverage to more than four pages. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 969-73 (Alan Miles Rubin ed., 6th ed. 2003). In preparing this article, the author has focused upon more recent arbitration cases on the theory that earlier decisions have not been influenced by a body of arbitral law and may not be representative of current thought.
2. Kenneth Grinstead, *The Arbitration of Last Chance Agreements*, 48 ARB. J., March 1993, at 71; Donald J. Petersen, *Last Chance Agreements*, 52 DISPUTE RESOL. J., Summer 1997 at 36.
3. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).
4. The parties should define what types of absences will count toward the maximum allowable number, but in no case may they include absences covered by the Family and Medical Leave Act. See 29 U.S.C. § 2615; 29 C.F.R. § 825.220(a)(iii)(c).
5. *See LTV Steel Mining Co.*, 110 L.A. 283 (Doepken, 1997). In this case, the LCA conditions were based upon a diagnosis of depression. The grievant complied with the treatment regimen, but when his absenteeism triggered his termination, it was found he had been misdiagnosed, which resulted in his taking an inappropriate medication. The arbitrator found the grievant's dismissal lacked just cause and directed that he be treated as if he had been on sick leave.
6.This language reflects a composite of LCAs the author has seen over the years and last chance conditions he has ordered in awards.
7. *Makino, Inc.*, 114 L.A. 1110 (Donnelly, 2000).
8. *Standard Products Co.*, 112 L.A. 1166, 1173 (Brodsky, 1999). Another arbitrator, however, held that giving lesser discipline does not repudiate or invalidate the LCA. *Central Ohio Transit Authority*, 113 L.A. 1134 (Imundo, 2000).
9. *Steelworkers v. Lukens Steel*, 969 F.2d 1468, 1475 (3d Cir. 1992).
10. In some instances, the employer may use last chance conditions as a form of discipline in lieu of terminating the employee. In *Western Textile Products, Greensteak*, 107 L.A. 539 (Cohen, 1996), the arbitrator enforced an LCA that was signed by neither the grievant nor the union, finding they were aware of the LCA and the grievant at least tacitly agreed to abide by the terms of the LCA by his return to work.
11. 321 U.S. 332 (1944).
12. *Boise Cascade*, 114 L.A. 1379, 1383 (Crider, 2000).
13. *Ingersoll-Dresser Pump Co.*, 114 L.A. 297, 300 (Bickner, 1999).
14. *See, e.g., Fort James Corp.*, 113 L.A. 742, 749 (Brown, 1999).
15. *Keystone Steel and Wire Co.*, 114 L.A. 1466, 1472 (Goldstein, 2000); *see also USS*, 114 L.A. 44, 46-47 (St. Antoine 1999).
16. *Steelworkers v. Lukens Steel*, 969 F.2d at 1475; Niro v. Fern Int'l, Inc., 827 F.2d 173, 175 (7th Cir. 1987).
17. *See, e.g., Lenzing Fibers Corp.*, 105 L.A. 423, 487 (Sergent, 1995); *see also Cross Refining Co.*, 111 L.A. 1013, 1023 (Bumpass, 1999).
18.*Gencorp Auto*, 104 L.A. 113, 117 (Malin, 1995).
19. *Minnegasco Inc.*, 110 L.A. 1077, 1080 (Jacobowski, 1998).
20. Petersen, *supra* note 2, at 38.
21. *U. S. Steel Corp.*, 120 L.A. 769, 771 (Vernon, 2004).
22. *Central Ohio Transit Authority*, 113 L.A. 1134, 1141 (Imundo, 2000).
23. *Branch County Road Commission*, 114 L.A. 1697, 1701 (Allen, 2000).
24. *International Paper Co.*, 109 L.A. 472, 477 (Terrill, 1997).
25. Arbitrator Daugherty first set out the "seven tests" of just cause in the railroad industry in Award No. 8431 of the National Railroad Adjustment Board, Third Division, and then in *Enterprise Wire Co.*, 46 LA 359 (1966).
26. THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS, 174-75 (Theodore J. St. Antoine, ed., 2d ed. 2005).
27. In *ABTCO, Inc.*, 104 L.A. 551, 552 (Kanner, 1995), the arbitrator reached the same conclusion, writing "A last chance agreement is, in essence, the parties' agreement defining what is just cause in respect to the grievant."
28. *Lenzig Fibers Corp.*, 105 L.A.. 423 ,427 (Sergent, 1995).
29. *Central Ohio Transit Authority*, 113 L.A. 1134, 1142 (Imundo, 2000); *Standard Products Co.*, 112 L.A. 1166, 1172 (Brodsky, 1999).
30. *Lenzig Fibers Corp.*,105 L.A. at 427.
31. *ABTCO, Inc.*, 104 L.A. 551 (Kanner, 1995).
32. *Napco, Inc.*, 111 L.A. 77 (Franckiewicz, 1998); *see also Shuttleport, Inc.*, 117 L.A. 492 (Goldberg, 2002).
33. *Hugo Bosca Co.*, 109 L.A. 533, 539(Franckiewicz, 1997).
34. *Bakers Union Factory No. 326 v. ITT Continental Baking Co.*, 749 F.2d 350 (6th Cir. 1984).
35. *Id.* at 353-54.
36. *Borden Italian Foods Co.*, 113 L.A. 13, 17 (Marino, 1999).
37. *Aeronca, Inc.*, 112 L.A. 1063, 1072-73 (Duda, 1999).
38. *See, e.g., Anchor Hocking Glass Co.*, 114 L.A. 1334, 1337 (Hewitt, 2000).
39. This author found no awards where a prior last chance award was interpreted. This may suggest that employees always comply with last chance conditions when they are imposed by an arbitrator, but that is doubtful.
40. *Glacier County Montana School District 15*, 112 L.A. 700, 704 (Prayzich, 1999). ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the equal employment opportunity laws, the first Amendment and the two collective bargaining statutes.

EEO Developments

Retaliation

In *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), the Supreme Court adopted a broad definition of what constitutes "retaliation" under Title VII of the Civil Rights Act of 1964. The Court held that any action taken by an employer that could dissuade a reasonable employee from engaging in protected activity can constitute retaliation, regardless of whether the employee suffered tangible harm.

Sheila White, a female forklift operator, complained of sexually disparaging remarks made by her male supervisor. As a result of White's complaint, the supervisor was suspended and ordered to attend sexual-harassment training. At the same time, White was reassigned from operating a forklift to other duties.

White filed a charge with the U.S. Equal Employment Opportunity Commission alleging that she was discriminated against on the basis of her gender and retaliated against for complaining about the alleged discrimination. White then filed a second charge with the EEOC alleging that her supervisor had placed her under surveillance. A short time later, White had a disagreement with her supervisor and was suspended without pay. Although White was later reinstated and awarded backpay, she filed another retaliation charge with the EEOC.

After exhausting administrative remedies, White sued in federal court alleging that the change in her job responsibilities and suspension amounted to unlawful retaliation. A jury found in White's favor and awarded her $42,500 in damages. The Sixth Circuit Court of Appeals initially reversed the judgment but later vacated its decision and heard the case en banc. The full court then affirmed the district court's judgment in White's favor. The Supreme Court affirmed.

The Supreme Court distinguished the anti-retaliation provision from the general anti-discrimination provision in Title VII, noting that the anti-retaliation provision is not limited to those harms that are related to employment or that occur in the workplace. The Court indicated that the objective of the anti-retaliation provision is to prevent employers from interfering with the ability of employees to secure enforcement of Title VII's basic guarantees. To achieve this objective, the Supreme Court found that the anti-retaliation provision cannot be confined to harms that affect terms and conditions of employment. Similarly, because Title VII depends upon individual employees for its enforcement, a broad interpretation of what constitutes retaliation is consistent with the statute's enforcement scheme.

The Court defined actionable retaliation as any action which might dissuade a reasonable employee from filing or supporting a charge of discrimination. This definition, noted the Court, will not immunize employees from the "petty slights" and "minor annoyances" common in the workplace. Rather, the definition creates an objective legal standard that takes into consideration the fact that any given act of alleged retaliation will often depend upon the particular circumstances of the case.

First Amendment Developments

Scope of Protected Speech

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), the Supreme Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Richard Ceballos, a deputy district attorney for Los Angeles County, informed his supervisors orally and then in a written memorandum that an affidavit used to obtain a search warrant contained serious misrepresentations. Despite Ceballos' concerns, his supervisors proceeded with the prosecution. When called by the defense, Ceballos recounted his misgivings about the affidavit. The judge, however, denied the defense's motion to suppress the warrant, explaining that he found grounds independent of the challenged material to show probable cause for the warrant.

Ceballos filed a 42 U.S.C. § 1983 suit, claiming that his supervisors retaliated against him for his memo and his statements to them and the court. He was demoted to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide prosecutions; he was denied a promotion; and he was transferred to another branch of the office, which required a longer commute.

Writing for the 5-4 majority, Justice Kennedy drew upon previous decisions that established that the

First Amendment protects public employees' rights in certain circumstances. Under *Pickering v. Board of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968), a two-part inquiry is required to determine whether an employee is speaking as a citizen on a matter of public concern. The first question is whether the employee spoke as a citizen on a matter of public concern. If so, then the possibility of a First Amendment claim arises, and the inquiry becomes whether the government entity had adequate justification for treating the employee differently from any other member of the public. The balance that must be struck lies, on one hand, in the nature of public employees as holding positions of trust in society; therefore, their speech that contravenes government policy may "impair the proper performance of governmental functions." On the other hand, the First Amendment cannot be used to restrict the liberties that public employees enjoy as private citizens.

The Court found that the dispositive factor in Ceballos' case was that his speech was made pursuant to his official duties. "Employers have heightened interests in controlling speech made by an employee in his or her professional capacity," Kennedy wrote. Failing to consider whether the speech was made as a citizen or in the course of official duty, as the Ninth Circuit did (and led to a ruling for Ceballos), would require a new, intrusive role for state and federal courts "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." The Court also suggested Ceballos' proper recourse was to other laws and labor codes, such as whistleblower protections.

Justice Souter, in his dissent, agreed that the *Pickering* balancing scheme was appropriate to use. However, he advocated for an adjustment to the *Pickering* inquiry in which private and public interests in addressing official wrongdoing and threats to health and safety could outweigh the government's stake in efficient implementation of policy. In those cases, a public employee's speech made pursuant to his official duties should be protected by the First Amendment. "[A] government paycheck does nothing to eliminate the value to the individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him." Souter warned that the holding would lead to moves by government employers to expand stated job descriptions to include more official duties so as to exclude currently protected speech from the First Amendment's purview (a consequence the majority rejected).

IELRA Developments

Confidential Employees

In *Support Council of District 39, Wilmette Local 1274, IFT-AFT v. IELRB*, 2006 Ill. App. LEXIS 539 (1st Dist. June 26, 2006), the First District Appellate Court held that a newly created position of network manager was excluded from the bargaining unit as a confidential employee under section 2(n)(ii) of the IELRA, 115 ILCS 5/2(n)(ii). The court based the exclusion on the network manager's unfettered access to computer files, including files containing confidential information used in collective bargaining and labor relations.

Wilmette School District 39 established the new position of network administrator and the union filed a unit clarification petition to add it to the bargaining unit. The IELRB Executive Director found the position to be that of an excluded confidential employee. The IELRB affirmed without precedent by a 2 to 2 vote, with one member recusing herself. The court affirmed the IELRB.

The court reasoned that the network manager had broad responsibility for design and maintenance of the district's computer network, including retrieving deleted files and restoring deleted files. This required the manager to access files containing confidential labor relations information. The court observed that when a file is displayed on a computer screen, it is virtually impossible to avoid reading it. The court rejected the union's argument that the district could avoid giving the network manager access to labor relations information by storing such data on removable disks.

The court relied on the plurality IELRB opinion in *Woodland Community Unit School District No. 5*, 16 PERI ¶ 1026 (IELRB 2000), which excluded a newly created position of technology coordinator as confidential. The court distinguished the IELRB's decision in *Lake County Area Vocational System*, 20 PERI ¶ 5 (IELRB 2004) which refused to exclude two computer technicians from the bargaining unit. In *Lake County*, the two employees had been in the bargaining unit for a period of time and finding them confidential would have excluded the entire computer technician workforce.

IPLRA Developments

Supervisors

In *Village of Niles and Metropolitan Alliance of Police, Niles Police Sergeants, Chapter 358*, No. S-RC-04-121 (ILRB 2006), the ILRB State Panel remanded for further fact finding and analysis the Administrative Law

Judge's ruling that eight police sergeants who had filed a representation certification petition were supervisors within the meaning of section 3(r) of the IPLRA, 5 ILCS 315/3(r). At issue was whether the sergeants possessed the authority to exercise one or more supervisory functions enumerated in the Act that would affect their subordinates' employment by issuing, or effectively recommending, discipline.

Citing *Metropolitan Alliance of Police v. ILRB*, 362 Ill. App. 3d 469, 839 N.E.2d 1073 (3d Dist. 2005), the State Panel employed a two-part test is used to determine whether verbal reprimands constitute discipline: 1) they must be documented, and 2) they must serve as the basis for future discipline or otherwise affect the officer's terms and conditions of employment. The State Panel instructed the ALJ to re-examine evidence to determine whether the sergeants had the authority to issue, as opposed to recommend, verbal warnings.

A second dispositive issue concerned whether the sergeants' recommendations constituted evidence of the supervisory authority to discipline. The State Panel wrote that the recommendation must be adopted as a matter of course with little or no independent review to meet the standard, citing *City of Peru v. ISLRB*, 167 Ill. App. 3d 284, 521 N.E.2d 108 (3d Dist. 1988). To determine if that standard was met, the panel instructed the ALJ to re-examine the record for the following factual findings: 1) the nature and level of higher-level review, including whether there was independent investigation; 2) the number of instances in which a sergeant's disciplinary recommendation resulted in discipline, even if the specific recommended discipline was not imposed; and 3) the number of instances in which the recommendations were made, and rejected. ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Haraway, Willam M. & Kunselman, Julie C. ETHICAL LEADERSHIP AND ADMINISTRATIVE DISCRETION: THE FIRE CHIEF'S HIRING DILEMMA. *PUBLIC PERSONNEL MANAGEMENT*. Vol. 35, no. 1. Spring 2006. pp. 1-14.

The authors present a situation where local government officials have to struggle between exercising their authority as public administrators to reject an unqualified firefighter candidate and submitting to political pressure to hire the candidate. Such an ethical dilemma is a result of recent efforts to reform government at the federal, state, and local level. Reforms include passing more managerial authorities and responsibilities to local levels, instituting private-sector managerial models, and privatizing public services. The authors argue that administrative changes as a result of reforms cause ethical dilemmas for public administrators, and this article illustrates how a fire chief deals with such a dilemma.

Carson, Paula P., Carson, Kerry D., Birkenmeier, Betty, & Toma, Alfred G. LOOKING FOR LOYALTY IN ALL THE WRONG PLACES: A STUDY OF UNION AND ORGANIZATION COMMITMENTS. *PUBLIC PERSONNEL MANAGEMENT*. Vol. 35, no. 2. Summer 2006. pp. 137-151.

This article reports the results of an interesting survey to examine organizational satisfaction among unionized public employees. The authors used four categories of employees: a) committed to the union, b) committed to the organization, c) committed to both the organization and the union, and d) uncommitted. The results show that public employees in categories (b) and (c) have greater job satisfaction, supervisory effectiveness, control over work, and occupational identity, compared to those in categories (a) and (d). The article presents other key findings on such factors as promotion, morale, and pay satisfaction. The authors then offer practical suggestions to both the union and the organization to foster work satisfaction.

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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