

WISCONSIN CHIEFS OF POLICE ASSOCIATION

Legal Update

Mount Pleasant, Wisconsin

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I. ADA ISSUES

- A. *Toyota v. Williams*, U.S. Supreme Court clarifies duty of accommodations under ADA. (Decided 01-08-2002) (00-1089)
- B. *Lawson v. CSX Transport*, 245 F.3d 916; 11 AD 1025 (7th Cir., 3/26/01) discusses whether ADA covers an insulin dependent diabetic.
- C. *Leiss v. Henderson*, 2001 U.S. App. LEXIS, 20312 (8th Cir., 2001) discusses ADA issues for a postal worker who “goes postal.”

II. DISCRIMINATION/SEXUAL HARASSMENT CASES

- A. *Clark County S.D. v. Breeden*, 121 S.Ct. 1508 (4/23/01) A single sexual comment leads to a sex harassment and a retaliation complaint.
- B. *Circuit City v. Adams*, 121 S.Ct. 1302 (3/2/01) Court encourages the use of arbitration agreements, even for discrimination cases.
- C. *Pollard v. du Pont*, 121 S.Ct. 1946 (6/4/01) awards front pay in addition to the punitive damage caps of \$300,000 for discrimination case.
- D. *Byrnie v. Town of Cromwell*, #99-9389 (243 F3d 93; 2nd Cir., 3/15/01) discarded applications undermined employer defense to ADEA case.
- E. *Goins v. West Group*, 619 N.W. 2d 424 (Minn., 2001) sexual harassment in a gender reassignment situation.
- F. *Bass v. WWF*, 129 F.Supp 2d 491 (E.D.N.Y., 2001) discusses whether the work environment affects reasonable expectations of the victim in a sexual harassment case.

III. UNION MANAGEMENT

- A. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F. 3d 1095 (2001) non-union employees’ right to a representative under the NLRA.
- B. *Kraus v. City of Waukesha*, certified to Wis. Sup. Court on 12/19/01.
- C. *Racine School District*, Dec. No. 29846-B (WERC, 2/2/01) installing video cameras is a permissive subject of bargaining.
- D. *Roth v. Glendale*, 2000 WI 100 (Wis. Sup. Ct., 2000) applies a presumption of vesting to prior retirees health insurance benefits.

IV. CONSTITUTIONAL RIGHTS

- A. *Durgins v. City of St. Louis*, (272 F.3d 841; 7th Cir., 2001) discusses limits on employee free speech rights.
- B. *Leventhal v. Krapek*, 266 F.3d 64 (2nd Cir., 2001) allows several searches of employees office computers.
- C. *Vaughn v. Lawrencebury*, 269 F3d 703; 17 IER Cases 1761 (6th Cir., 10/19/01) upholds nepotism policy based on compelling governmental interest.
- D. *Daniels v. Arlington, Texas*, unpublished 2001 US App LEXIS 6018; (5th Cir., 4/9/01) allows regulation of uniform and plainclothes officers to prohibit wearing of a cross.

V. MISCELLANEOUS

- A. Section 968.205 Wis. Stats. (presentation of certain evidence).
- B. Use of e-mail for open meetings law purposes, AG opinion of October 3, 2000.
- C. *League of Municipalities Opinion*, June 2001; office of police officer and alderperson are incompatible; vacancy of one likely upon taking oath for the other.
- D. *Aviles v. Cornell Forge Co.*, 2001 W.L. 168214 (7th Cir., 2001) no violation of rights when police called to assist with employee who makes threats.

VI. DEALING EFFECTIVELY WITH THREATS OF VIOLENCE BY EMPLOYEES

- A. Remove the Employee from the Workplace Promptly
 - 1. Administrative leave with pay may apply; sick leave may be an option
 - 2. Prohibit return until further notice
 - 3. Ensure availability and access to the employee at your direction
 - 4. Prohibit direct contact with fellow employees or witnesses outside the workplace
 - 5. Prohibit any action “on behalf of” the employer (get keys, ID cards, uniforms, etc).
- B. Get the Facts
 - 1. Written statements from witnesses

2. Question the accused. *Garrity* warning is a useful tool: “Nothing you say, nor the fruits thereof, may be used against you in any later criminal proceedings.”
 3. Check on lax enforcement in the past (shop talk).
- C. Seek a Written Psychiatric Opinion. Determine whether the threat was caused by a psychological condition and whether the employee represents a threat to the safety of others (ADA issues).
- D. Consider Proper Penalty. Most arbitration cases support severe discipline, despite claims the employer has tolerated “shop talk,” a later apology by the employee, the lack of intent by the employee to follow through on the threat, or the existence of a long, clean employment record. For example, in *Georgia Power Company*, 100 LA 522 (Singer, 1993), a 17-year employee said he was going to kill his supervisor, and referred to the fact that he had access to a gun. He had no prior disciplinary record. The police investigated and determined in their opinion the grievant was not a threat to his supervisor. The grievant, after he learned his job was in jeopardy, “did what any sensible individual who valued his job would have done, he apologized.” Previously, other employees who said they were going to “get the President and Chief Executive Officer” when they made decisions downsizing the company were not disciplined. Yet, arbitrator David Singer determined he was compelled to uphold the discharge of the grievant. Arbitrator Singer made several key observations.
1. On the issue of the apology, he said, “When a threat of physical violence is made, however serious it might later be judged to have been, an apology counts for little”. At page 629.
 2. On the issue of the fear of the supervisors who were threatened, Arbitrator Siger repeated the grievant’s threat, and said, “I find this proclamation to be frightening; I expect that the Superintendent and investigating officials were similarly impressed.” At page 630.
 3. Distinguishing the “shop talk” by other employees that they would “get the President and Chief Executive Officer,” Mr. Singer said:

Statements of discontent characteristic of those relating to the downsizing cannot be viewed as direct threats. On the other hand, the threat made by the grievant could not have been any more direct. At page 630.
 4. The arbitrator recognized the real risk of reinstatement of the grievant by observing:

I am persuaded that company officials took the only available course of action. They could not very well wait until the grievant actually did violence, and then discipline him....the result, on the next occasion, could be disastrous. At page 630.

5. Finally, the arbitrator demonstrated that cases involving threats of violence are beyond the “usual” approaches used by arbitrators by concluding:

I can identify no utterance that an employee can make that is more serious than a threat upon the life of a co-worker. Furthermore, an unanswered threat upon the life of a superior introduces the additional grim specter of a breakdown of discipline within the organization. At page 630.

- E. In *Burlington Northern*, 90 LA 585 (Goldstein, 1987), the grievant admitted he said “in jest” that “if I had a gun, I could shoot [the company President] and make everyone happy, including my family.” His brothers had previously been terminated by the company after a buyout. Employer witnesses testified the threat was not made in jest. This was the sole issue which led to the employee’s termination, upheld by arbitrator Goldstein. The grievant in that case said he was not serious, and had not formed the intent to carry out his threat. The arbitrator said, “Grievant’s subjective intent is really irrelevant on that point. The fact that he made such statements is sufficient to constitute cause, in my view.” At page 591.

Finally, summarizing the arbitral precedent he relied upon in his decision, and citing several court and NLRB cases, arbitrator Goldstein stated:

It is also well established, however, in arbitration, that threats of physical violence by employees directed toward supervisory or management personnel constitute a serious breach of acceptable employee conduct. If established through credible evidence, these threats will also generally support summary removal without requirement of the application of the corrective or progressive discipline principle. At page 590.

- F. One of the cases cited by Arbitrator Goldstein is *United Parcel Service*, 76 LA 1086 (Rubenstein, 1981), a particularly relevant case for two reasons.
 1. First, the grievant’s subjective intent is not a factor when the employee’s statement is perceived as a threat by the supervisor. The arbitrator said, “Communication of a threat does not necessarily depend upon the subjective desire to threaten another person.” At page 1093.

2. Once again, summary discharge was upheld where the employee said to a supervisor “Get the Hell out of my face before things happen that we don’t want to have happen,” while showing an upraised fist.

G. In *Protective Treatments Incorporated*, 61 LA 1292 (Laybourne, 1974), the grievant threatened to have the supervisor “taken care of” by a hired killer for a price. There were no prior threats by the grievant, no overt action to carry out the threat, and the grievant had not been provoked. The arbitrator understood the impact of such a statement on the workplace when he said:

... when the grievant threatened his foreman’s life in front of his co-employees, this action constituted an offense which had a chilling effect on the entire working force present in the lab ... To hold that the acts of the grievant did not constitute just cause for discharge would be to condone abusive and threatening conduct on the part of employees. At page 1265.

Also, the arbitrator commented about the chilling effect of the grievant’s behavior on fellow employees, noting:

It upset one employee to the point that he wanted a transfer out of the department, and another employee gave an untrue version of the incident because he was afraid of the grievant. At page 1265.

H. In *Arrow Trailers Incorporated*, 62 LA 387 (Caraway, 1975), the grievant consummated a garnishment dispute with his employer by saying, “If I do not get my check, something bad will happen to your family.” The union asked the arbitrator for mitigation based on the grievant’s excellent work record, the fact there was no physical aggression, and that the threat was made in a fit of anger. The arbitrator rejected these theories, saying:

It is unreasonable to expect the company to be required to return to employment an employee who, in a fit of anger, has uttered a threat to do bodily harm to one of the company’s chief officers. . . . An employee who becomes so angry and upset that he threatens to do bodily harm to a company officer is not the type of employee this company should be required to employ. At page 388.

Also commenting on the union’s “shop talk” argument, the arbitrator said:

While it is true that cursing and profanity is generally tolerated in the environment of the industrial plant, it is recognized that such expressions are made in a kidding and joking manner with no serious threat to anyone involved . . . The [grievant’s] words themselves carry the full import that [grievant], if he had the opportunity, would do bodily harm to Mr.

Dickens. This is reprehensible conduct and cannot be tolerated in any industrial plant. At page 388.

- I. The Arbitrator in *D and D Poultry*, 81 LA 553 (Nelson, 1983) concluded that it is the employer, not the arbitrator, who is in the best position to make a good faith risk assessment in a threat case. After the grievant threatened to blow up the plant and his supervisor's house, he was terminated. The arbitrator said:

We think the appropriate test here is not whether the grievant really intended to blow up the plant and/or Brock's home. We have no way of determining that, nor did Brock. Nor do we think it either necessary or even reasonable to wait to see whether he does in fact blow up the plant and/or Brock's home. The threat itself is sufficiently egregious to justify harsh discipline up to and including discharge. The reason this is so is that such threats . . . make it extremely difficult if not impossible for the management to maintain control of the workforce, demoralize union-management relationships, and threaten productivity, without which no competitive organization can long survive. At page 556.

The arbitrator then commented on who is in the best position to make a judgment about leniency in these cases. He stated:

Too much is at stake. The potential consequences are too serious. If management, knowing the grievant much better than this arbitrator does, wishes to take the chance, it may do so, and give the grievant another opportunity to be what he apparently was up to October 21, 1981: An entirely satisfactory employee. But this arbitrator cannot, and indeed is not inclined to, impose this requirement. At page 556.

VII. UPDATE ON OPEN RECORDS CASES

1. Clarification of the Balancing Test: *Atlas Transit, Inc. v. Korte*, 2001 WL 1403613 (Ct. App. 2001) (publication decision pending)
 - a. A television reporter requested names and birth dates of bus drivers from various bus companies to see if bus drivers had appropriate backgrounds, credentials and driving records. They refused and so reporter made open records request to MPS. MPS decided to release the information, but would delay it to give bus drivers *Woznicki* rights.

- b. Court decided:
 - i. Nothing in *Woznicki* requires custodian to prepare a detailed analysis of the factors used in applying the balancing test.
 - ii. Nonetheless, balancing test favored disclosure:
 - iii. “[T]he exercise of due diligence on the part of parents, the school system and authorities, requires knowledge, and the failure to supply those names and commercial driver’s licenses will adversely affect the confidence of the public. And in fact, by raising the issue, creating a suspicion that all might not be well in the transportation business.”
 - iv. Release of driver’s names and license numbers would not necessarily cause an “irreparable invasion of privacy and reputational harm” nor is it an unlawful disclosure of proprietary business information.
2. Redaction of Public Records: *Osborn v. Board of Regents University of Wisconsin System*, 2001 WI App 209, 624, N.W.2d 563 (Ct. App. 2001)
- a. Equal opportunity agency sought disclosure of university’s records pertaining to students and applicants. If university would not disclose information that would be considered “education records,” then agency wanted university to redact personally identifiable information.
 - b. Court decided:
 - i. Recognized that § 19.36(6) Wis. Stats. requires authority to delete information which is not subject to disclosure before release, however...
 - ii. Section 19.36(6) does not require the University to produce records after redacting personally identifiable information.
 - iii. Circuit court held this would be “tantamount to creating new records” and court of appeals held the university was not required to “review each education record and remove part of it.”
3. Who makes the copies?: *Grebner v. Schiebel*, 2001 WI App 17, 29 Media L. Rep. 1572, 240 Wis.2d 551 (Ct. App. 2000)

- a. Records requester was a political consultant providing information on voter histories to candidates and political parties. He dispatched employees to county clerks' offices and provided them with a portable photocopy machine to make immediate copies of records. The Polk County Clerk told the employee he could not make his own copies, but that a person from the office would copy the documents for a charge.
 - b. Court decided:
 - i. No "denial" of access to public records.
 - ii. Under the Act, the custodian has the discretion to either allow the requester to make a copy or for the custodian to make the copy of the record. It is at the custodian's, not the requester's option.
 - iii. Important public policy: need to keep records in their possession and in good condition.
4. 911 recordings: *State ex rel. Milwaukee Police Association v. Jones*, 237 Wis.2d 840, 2000 WI App 146 (Ct. App. 2000)
- a. Union made a request for disclosure of a specific 911 call. The request stated that the form of response was to be unaltered, unmodified and otherwise uncensored in any fashion. The message was originally recorded in a Digital Audio Tape (DAT) format. The Chief provided the union with an analog recording of the DAT tape.
 - b. Court decided:
 - i. No dispute that the analog version was as audible as the original DAT, but...
 - ii. Union needed DAT version to allow their expert to "make a digital recording of the calls for the purpose of conducting a spectrographic and waveform review and enhancement of the conversations."
 - iii. Section 19.36(4) allows a requester access to the material used as an "input for a computer program" and the material "produced as a product of the computer program."
 - iv. "As technology advances and computer systems are refined, it would be sadly ironic if courts could disable Wisconsin's open records law by limiting its reach...After all, as

modern society rapidly adds to its sophisticated methods of data collection, it inevitably filters ‘the human mouth, tongue [and] vocal cords’ through computer systems. A potent open records law must remain open to technological advances so that its statutory terms remain true to the law’s intent.”

5. When you just don’t have the information: *Machotka v. Village of West Salem*, 607 N.W.2d 319, 233 Wis.2d 106 (Ct. App. 2000).
 - a. Requester wanted names and ultimate purchasers of municipal bonds issued by Village over a 17-year period. The Village provided all the information it had in its possession and advised the requester it neither possessed nor had access to the remaining information.
 - b. Court decided:
 - i. Governmental entity cannot evade its responsibilities under the Open Records Act by shifting the record’s creation or custody to an agent, but...
 - ii. Baird, the alleged “agent” was only contracted to underwrite the bond issue—Baird’s eventual sale of the bonds was taken for Baird’s own purpose and benefit, not the Village’s. Village therefore had no custody or control over records.

VIII. FLSA AND PAYROLL PRACTICES UPDATE

A. *Heder v. City of Two Rivers*: Training Repayment Agreements

1. Firefighter’s Union signs agreement which required firefighters who voluntarily resign within three years of starting paramedic training to repay City for: 1) cost of training and 2) liquidated damages (an amount equal to wages received for training and premium pay). Firefighter leaves two and one-half years after the training. The City enforced the agreement and reduced firefighter’s last paycheck to nothing.
2. Court’s decision:
 - a. Upheld concept of training repayment agreements generally.
 - b. Imposed serious restrictions on use:
 - i. requirement must be “reasonable,”

- ii. “reasonably necessary” to protect the employer’s interests,
 - iii. amount to be repaid must be somehow related to actual cost of the training;
 - iv. amount, duration and schedule of repayment must be fair; and
 - v. employee must be given credit towards potential repayment for the time worked.
- c. Liquidated damages beyond the amount is problematic.
 - d. Can reduce wages earned, but not less than minimum wage.
3. Practical considerations:
- a. Explain the need for the repayment system, describing the employer’s interests.
 - b. Coordination with the Union representative and payroll system.
 - c. Keep it reasonable as to duration and amount.
 - d. Establish a schedule, including a sliding scale for repayment based on service.

B. Deductions from Wages: *Batteries Plus, LLC v. Mohr*

- 1. Batteries Plus claimed it accidentally overpaid employee \$11,500 for mileage expenses. Employee counterclaimed alleging that he was wrongfully discharged contrary to § 103.455 when he refused to reimburse the company, through deductions from future wages.
- 2. Court’s decision:
 - a. Section 103.455 does not evince fundamental and well-defined public policy.
 - b. Not prohibited from discharging under employment-at-will doctrine.
 - c. Remanded to circuit court.

C. Salaried Employees and Use of Partial-Week Suspensions: *Block v. City of L.A.*

- 1. Follow up to *Auer v. Robbins*

2. Employees worked for the City and its Water and Power Department. Employees admitted they had duties consistent with executive, professional and administrative employees, but claimed they were still owed overtime because they were subject to partial-week suspensions for non-safety violations.
3. Court's decision:
 - a. "Actual practice" of improper disciplinary deductions (14 in six years) compared to theoretical possibility.
 - b. Disciplinary suspensions of more than one week, but less than two, are also inconsistent with the salary-basis test.
 - c. "Window of correction" is not available for "actual practice" of making improper disciplinary deductions.

D. Administrative Exemption: *Webster v. Public Employees of Washington*

1. Employees was "union field representative" employed by Union. Employee negotiated CBA and represented union members in grievance, discipline and related matters. He was paid an annual salary of \$65,000 plus expenses. Employer (Union) would dock his accrued sick and vacation time banks for every hour less than 40 hours per week he worked. Employee claimed this deduction destroyed salary basis exemption.
2. Court's decision:
 - a. Uses both FLSA and Washington wage and hour law.
 - b. FLSA allows employers to made deductions when employee is absent for personal reasons other than sickness or accident.
 - c. Because leave time is not salary, and because leave was convertible to cash, there was no deduction of "salary" and therefore salary basis test remained in tact.
 - d. Query: What would happen after leave banks exhausted?

E. Police Work Cycles and 7(k) Exemption: *Franklin v. City of Kettering*

1. Officers were on a 42-day recurring duty schedule (6-2, with extra 4 days off every 6 weeks). The CBA provided for overtime for all hours over 40 hours. Employer implemented a 28-day work period under the 7(k) exemption. The Union claimed employer could not do so because it did not coincide with actual duty schedule. Union also claimed overtime based on shift differential pay.

2. Court's decision:
 - a. Work period under FLSA does not need to coincide with actual duty cycle or pay periods.
 - b. Still needs to be regularly occurring and not used to avoid overtime.
 - c. Work period under FLSA also does not need to coincide with 40-hour work period in CBA.
 - d. Overtime payments under the CBA which exceed those due under the FLSA satisfy the law.

F. Canine Officers: *Brock v. City of Cincinnati*

1. 10 canine officers brought claim under FLSA for back pay and damages based on canine-care work performed at home while off-duty. Employer and officers had previously agreed that officer would be paid straight time for 17 minutes a day, seven days a week. District court found agreement to be "unreasonable."
2. Court's decision:
 - a. Care of dogs is "work" under the FLSA, i.e. it is an "exertion not specifically required by but expended (as expected) necessarily and primarily for the benefit" of the employer.
 - b. Work was more than *de minimis*.
 - c. However, agreement was reasonable:
 - i. Also received non-monetary benefits.
 - ii. The relatively small amount of paid time is does not necessarily render the agreement unreasonable.
 - iii. Officers entered canine program voluntarily and with "eyes wide open."
 - iv. Department bargained with Union on two occasions who first neglected and then refused to press the compensation on the canine officers' behalf.

G. Off-Duty Overtime Work: *Johnson v. Unified Government of Wyandotte County*

1. Police officers also performed part-time patrolling for a local housing authority. The officers claimed that they were not independent contractors

of the housing authority. They also claimed they were entitled to overtime because they were not subject to the FLSA 7(p) special detail exemption for public safety employees.

2. Court's Decision:
 - a. Police officers were independent contractors when they were doing patrol work for the housing authority.
 - b. Department and housing authority were not "joint employers" under the FLSA.
 - c. Special duty exception applied.

H. Compensable time: *Turner v. City of Philadelphia*

1. Corrections officers claimed that they should have been compensated for time spent changing in and out of their uniforms. Suit brought by 200 current and former officers for \$2.8 million plus attorneys fees.
2. Court's decision:
 - a. "Hours worked" exception under the FLSA references excluding time spent changing clothes via express terms or custom under CBA.
 - b. Officers had not been compensated for change time in 30 years.
 - c. CBA between the employer and union has always been silent as to change time.
 - d. Informal requests had previously been made by union, but no request had been ever made in a formal CBA negotiation, nor had any grievance been filed.
 - e. Claim was dismissed.

IX. DEVELOPING PRODUCTION STANDARDS (NOT QUOTAS)

- A. Section 349.025 Wis. Stats. prohibits "quotas," but allows the comparison of "citations, complaints or warning notices" for evaluative purposes.
- B. Developing a defensible data collections system that avoids attacks on its fairness.
 1. Day of the week
 2. Specific shift

3. Consideration of special duties/responsibilities
 4. Assigned patrol zones
- C. Establishing a minimum “production standard” for comparative purposes from the data
 - D. Building in an opportunity for the specific officer to identify reasons or rationales (excuses) for failure to meet the production standard.
 - E. Consider removal of obstacles to meeting pure production standards by limiting other discretionary police activities (i.e. focus on traffic enforcement only).
 - F. Use of supervisory ride alongs to give direction to officer concerning locations and law enforcement tactics designed to effectively detect and apprehend law violators.
 - G. Demand increased detail on daily reports to assist the Department in determining whether there are any patrol strategies or other distractions which are contributing to the lack of measurable production.
 - H. In the event of debates over “enforcement discretion,” the cases place that discretion squarely in the hands of supervision, and officers can be directed to exercise that discretion in specific ways consistent with management’s direction. (See attached.)

MEMORANDUM OF LAW

TO: WCPA Members

FROM: James R. Korom

DATE: February 7, 2002

RE: Applicable Cases Concerning Police Production Standards

In their fourth edition of How Arbitration Works, (BNA, 1985) Elkouri and Elkouri stated that:

Where the agreement contains no expressed provisions on the subject, it has been held in many cases that management has the right to set reasonable production standards and to enforce them through discipline. In other cases this general right of management is expressly or impliedly recognized, but the discipline for failure to meet a production standard did not stand because the standard was unreasonable or because the discipline was unjust for some other reason. At p. 489.

In their 1991 Supplement to How Arbitration Works, Elkouri and Elkouri again stated:

Arbitrators continue to agree that management has the right to enforce reasonable production standards through discipline. At p. 132.

In Hertz Corporation, 103 L.A. 65 (Pool, 1994), the arbitrator analyzed and rejected the argument that discipline for low production could not constitute just cause because just cause governs disciplinary authority, and penalties cannot be imposed against employees who have not committed misconduct. Under this theory, failure to meet a production standard is not misconduct unless it is the result of a fault on the part of an employee. To sustain the discipline, this theory suggests, the employer needs to produce evidence demonstrating that the employee did something wrong which caused him or her not to meet their quotas. There has to be substantive evidence of slowdown, shirking, laziness, negligence, lack of proper application to the job or some other misconduct. See Oroville Product, Inc. 88 L.A. 204 (Dworkin, 1987) at p. 207.

In disagreeing with arbitrator Dworkin in that case, arbitrator Pool stated:

I disagree with arbitrator Dworkin for several reasons. First, this reasoning deprives management of its right under the management rights clause to maintain the efficiency of the operation. The right to establish a productivity schedule to ensure efficiency is meaningless if one cannot also discipline those who fail to meet the standards assuming, of course, the system is fair and discipline is applied consistently and takes into account those factors which affect performance. Second, underlying the right of management to discipline non-productive employees is a recognition that denying management the right to discipline incompetent employees could have disastrous economic consequences. Legitimate productivity systems ensure production is maintained at a level sufficient for the business to be profitable. When productivity does not meet the standard, it places the existence of the business at risk. If an employer cannot discipline employees absent misconduct, it would mean an employer could have an operation which was losing money and the employer could not discipline the employees whose poor performance caused the operation to lose money. The obvious result of arbitrator Dworkin's logic is the employer would have no choice but to close the operation which would result in a loss of jobs for all employees including those whose competence was undisputed.

The view that an employee can be disciplined for low productivity without any proof of misconduct is consistent with the weight of arbitration opinions. In How Arbitration Works, supra, at 661, Elkouri and Elkouri list numerous cases in which low productivity alone was a legitimate basis for terminating an employee. In Kelly Springfield Tire Company, supra, arbitrator Dean found the company could discipline an employee who failed to meet production standards.

In short, the collective bargaining agreement, the economic realities under the collective bargaining agreement and the weight of arbitrator decisions all support the conclusion that the "just cause" requirement means management can discipline an employee for poor performance and need not show misconduct. 103 L.A. 65 at 74.

In a case involving the disciplinary suspension of a warehouse man for continuing low production after having received repeated warnings in regard to his low productivity, arbitrator Darrow in Lash Distributors, Inc. 74 L.A. 275 (1980) held that maintenance of high efficiency is important to the profitability of the company and the continued jobs of the employees.

Continued low production of M_____ is very demoralizing to a work crew and cannot be condoned.

A word of caution to M_____. Your employer is using progressive discipline against you and it predictable that if you do not immediately improve your department, you can expect to be discharged without any hope of reinstatement. At p. 278.

In dealing with a police department case involving an alleged improper ticket “quota” arbitrator Heinsz in City of Toledo 70 L.A. 217 (1977) stated:

The arbitrator also finds that there was no evidence of an improper “quota” requirement in regard to the issuance of traffic tickets in the City of Toledo. Although the grievants testified that there seemed to be a quota system, this evidence was not persuasive. None of the officers specified any supervisors who directly told him to account for a certain number of VTOs per day. As Officer Zakrzewski testified, the number of tickets to be written was only “expected” and was never stated. This number for the Accident Investigation Unit was allegedly between three and five tickets per day, according to the grievants. However, the arbitrator finds this difficult to believe because the specified period (October 1976 to January 1977), the average number of tickets issued by members of the Accident Investigation Unit was always less than three (the highest average being 2.31 in November of 1976)...thus, if there was a quota, no one in this division met it with the limited exception of the two officers noted above.

The arbitrator agrees that there is an inherent difficulty when utilizing the effects of traffic enforcement (i.e., the issuance of traffic citations), to measure the performance of an officer. If the Department requires a set number of VTOs per day then a quota would exist which is clearly improper. On the other hand, if the Department uses a more flexible standard as in this case of measuring an individual against the average number of VTOs handed out per month in the unit, then there will always be at least one-half of the persons in that unit performing at a substandard rate.

Still, the latter, flexible standard is a preferable system so long as the average is used only as a “norm” to measure a variation of a wide and continuing degree....However, the arbitrator would also note that although the issuance of VTOs was one means to measure traffic enforcement, it is certainly not the only relevant criteria. For example, the amount of time that an officer was out of service investigating accidents would certainly be relevant to the number of traffic citations he could issue. Also, other factors, such as traffic warnings rather than the issuance of tickets, should certainly be

recorded since the two are a means of enforcing traffic regulations.
70 L.A. 220-221 (copy attached.)

Arbitrator Heinsz then went on to measure the appropriateness of the disciplinary transfer of three police officers for failure to issue the appropriate number of citations; upholding one disciplinary transfer and nullifying the other two based on the fact that the two officers in question were close to the averages and the fact that at least one of them was not told of any expectation that he was to raise his average number of tickets issued. As to the third officer, however, the arbitrator stated:

His deviation from the norm of traffic citations in all four months was much greater than either Officer Dietrich or Officer Zakrzewski. He was practically the lowest member in the Accident Investigation Unit in the issuance of citations in both December (1.36) and January (1.05), even when one considers "in service" and "out of service" time. Moreover, his production in October of 1976 (.060) and November of 1976 (0.71) was less than one traffic citation per day. When one considers the degree of variance from the average number of VTOs issued per day over the four month period, it is clear that Officer Schultz made little or no attempt to increase his enforcement of traffic regulations. In October of 1976 he issued only 33% of the average number of citations per day. In November, this figure dropped to 31% of the average. Although in December, his rate of issuing tickets rose to 63% of the average, in January it again dropped to below one-half (47%) of the average number of citations per day.

The notice given Officer Schultz was also substantially different in regard to his failure to perform adequately. As noted in the case of Officer Zakrzewski, City Exhibits Numbers 4, 5 and 6 were never posted, and Officer Schultz...could not know the exact level of performance which was expected of him. On the other hand, his total number and average number of citations were so low that he must have been aware that he was performing at an unacceptable level and the evidence indicates he made little or no effort to increase his performance to a minimally acceptable level. From this action one can impute knowledge on the part of Officer Schultz that he was not performing anywhere near the level he should in regard to traffic enforcement. 70 L.A. at 222.

In a case upholding a one day suspension of a police officer for failure to meet minimal monthly performance quota of one ticket per day, arbitrator Bard, City in Richfield, 89 L.A. 1040 (1987) carefully scrutinized the application of the seven tests of just cause to a the suspension for failure to meet a ticket production level based on the following statistics:

1. The average number of enforcement activities in the City of Richfield averaged about 2.4 per shift based on a one year study, and the requirement of the officers is only 1 per shift;
2. The grievant did not meet that requirement on four different occasions;
3. Only two other incidents of failure to meet the requirements by other officers have occurred, and they were not repeated since the program was put into affect;
4. In August, the grievant had 3.7 hours per shift of time not described in his daily activity reports compared to 2.6 hours for another officer who was able to achieve his quota;
5. The total departmental percentage of time used on tag/bookings, i.e., enforcement activities, was 22.07% as opposed to the grievant's average of 13% for the month of August. Officer Gabrysh's August percentage was 24.79% and Team Three's average, on which both officers work, was 21.7%.

The arbitrator concluded that the employer had established the statistical evidence that the grievant's performance was below par, both the average and the median performance, and that ample time existed for him to improve the level of his performance. 89 L.A. 1046.

Arbitrator Bard considered this case compelling:

“Not because the arbitrator believes that the established standard in all instances is valid, or valid at all, but because of the number of times the grievant failed to meet an apparently reasonable standard as opposed to the other officers on his shift. The arbitrator can therefore infer not only a persistent failure to meet a “quota”, but substandard performance based on a failure to achieve a median or mean performance level based on established criteria. This, combined with the unaccounted for free time, entitled the arbitrator to infer nonfeasance on the part of the grievant regardless of the existence of a so-called “quota.”

Cases of non-feasance are...extremely difficult for arbitrators to resolve. Unlike cases of specific misconduct, they are always subject to the argument that there is no one present to allege that the grievant has affirmatively done anything wrong. On the other hand, an arbitrator cannot simply ignore such allegations by an employer. If he were to do so, the entire system, the ability of an employer to ensure itself of having a competent and aggressive workforce, would collapse. 89 L.A. at 1047.

In concluding that a one day suspension was an appropriate penalty, arbitrator Bard stated:

It is clear that the right of the employer to direct the attention of its workforce in any particular direction is within its own purview. It is not a proper function of the Union to suggest that employees cannot perform under that program because they are busy elsewhere. The determination as to whether they ought to busy elsewhere is that of the employer which, within the restrictions placed upon it by its ministerial obligation to the State of Minnesota and to the citizens of the state and the City of Richfield, it is free to choose its own methods of operation and law enforcement. 89 L.A. 1049.

In sum, arbitrators are reluctant to upset the determinations of management with regard to the level of production for police officers. While it may be difficult to monitor the moment to moment activities of police officers, arbitrators are willing to hold them to standards established by an employer which are based on averages achieved by similarly situated co-workers. Therefore, absent unique or extenuating circumstances which would limit a police officer's attainment of average production, progressive discipline for consistently failing to be near the average established by an employer is a lawful and appropriate basis for discipline.

[date]

To: _____

Dear Officer _____:

You are hereby ordered to attend a psychological fitness-for-duty evaluation. The evaluation will be conducted by Dr. _____. The evaluation will take place on [date and time]. The evaluation will take place at [address]. This appointment was scheduled during your regularly scheduled tour of duty, and you will be paid for your travel time as well as the time spent in the evaluation session. You are then to return to the Department for further assignment.

I have enclosed for your review a copy of the letter sent to Dr. _____, which explains in more detail the reasons prompting this order, and the limited information sought from his office. We are not asking Dr. _____ to provide us with any confidential, medical or psychological information, but merely asking for an assessment of your fitness to perform your job duties without risk to the health and safety to yourself, fellow employees, or the general public. Any medical documentation provided to my office will be kept strictly confidential.

If you have any questions or comments, please contact me at your convenience.

Sincerely,

[name]

enclosure

[date]

[name]

[address]

Re: Fitness-for-Duty Evaluation

Dear Dr. _____:

We have scheduled an appointment with your office for [date and time] for the purpose of conducting a psychological fitness-for-duty evaluation for one of our employees_____.

There have been a number of incidents in the recent past, which have caused me concern over whether he represents any risk to his own health or safety, or that of co-workers or the general public. We are requesting you to conduct whatever evaluations you deem necessary, and to reach a conclusion whether Mr. _____ does, or does not, represent such a risk if we retain him in his present position.

The specific events, which have caused me some concern are as follows:

[explain events]

In light of the fact that the job itself requires Mr. _____ to deal with highly stressful situations, and in light of the fact that he must be able to _____, in the pursuit of his job duties, I have special concerns about his ongoing ability to perform his job safely. Therefore, we respectfully request that you evaluate Mr. _____'s present ability to perform the duties of his job, and inform me whether he can or cannot perform those job duties safely, without risk to the safety of himself or others. A form for such a release is attached for your convenience.

Thank you in advance for your cooperation.

Sincerely,

[name]

enclosure

RETURN TO WORK RELEASE

I hereby certify that I am a mental health professional, qualified to render reliable medical opinions concerning the ability of individuals to perform their job duties, especially as a police officer. I further certify I am familiar with the job duties, requirements, responsibilities and stresses faced by police officers. I further certify I have reviewed all relevant medical records, and have conducted whatever examinations I deem necessary to render a reliable medical opinion concerning the ability of _____ to perform his job duties. I have been advised of, and have considered, the various problems and concerns which prompted the employer to commence an inquiry into his ability to safely perform his job duties without risk to himself, his co-workers, or the general public. I further recognize that I am aware of the potential for legal liability should the employer's reliance upon my medical opinion lead to harm to others which could have been avoided. Having carefully considered all these factors, I hereby certify that _____ can perform all of his job duties without restriction and without creating a risk to the safety of himself, co-workers, or the general public.

Date
