When an employer and represented employee enter into a last chance agreement (LCA) without the union's participation, and the employer subsequently discharges the employee for a violation of the LCA, the arbitrator may properly interpret and apply the "just cause provision" in the collective bargaining agreement (CBA) to find the LCA "unconscionable" in the circumstances and require the employee's reinstatement with back pay. Applying a highly deferential standard of review, a court must enforce the award, since the arbitrator based his decision on the CBA, so held a federal appeals court in St. Louis in Associated Electric Cooperative, Inc. v. International Bhd. of Elec. Wkrs., Local 53, 2014 U.S. App. LEXIS 8953 (8th Cir. May 14, 2014), reversing the holding of a lower court.

Background
The CBA allowed discipline or discharge only for just cause. It did not address the effect of a LCA.

The grievant, Leo Johnson, an HVAC mechanic with 28 years' service with the company, was directed to take a "random" drug test (for employees at work that day) based on a practice instituted by the employer a few years earlier after discussions with the union (and, evidently, a broad management rights clause in the CBA). After providing a urine specimen, Johnson told the plant manager he would test positive, having smoked marijuana recently while on leave to attend his brother's funeral. The employer offered Johnson union representation for a disciplinary proceeding, but he declined, and after signing a standard form LCA, was suspended. The LCA contained the employee's agreement that if "I report to work under the influence, test positive, or I am in the possession of alcohol, drugs, or controlled substances on Cooperative property, my employment with AECI will be terminated."

A week later, Johnson was advised his return to work would be contingent on his successful completion of a treatment program, and a negative drug screen test result. The next day, the employer received the result of the drug test Johnson had taken. It was negative.

Nevertheless, Johnson remained on suspension and continued treatment. During his suspension he underwent two more drug tests showing traces of THC (marijuana), preventing his return to work. The tests also showed the presence of a benzodiazepine drug for which Johnson had a prescription.

Eventually, the treatment counselor cleared Johnson to return to work. He was directed by the employer to take a return-to-work drug test. The result came back positive for another benzodiazepine, Valium, for which Johnson had no prescription. He claimed unsuccessfully he had mistaken a family member's Valium for his own benzodiazepine prescription. Johnson was terminated under the LCA.

The union grieved his discharge relying on the LCA's termination sanction. The employer denied the grievance. The union submitted the case to arbitration.

Arbitrator's Decision
Recognizing that LCAs commonly are substituted for "just cause" provisions, the arbitrator nevertheless concluded that this LCA was "unconscionable." The negative drug test result Johnson had received on the random drug test showed he had not broken any work rule, the arbitrator said, and therefore, continuing his suspension after learning of the result was "simply indefensible." The
The arbitrator also faulted the employer for failing to consider Johnson’s explanation for the positive result on the return-to-work screen and for not further delaying his return until he passed it. Considering these circumstances and Johnson’s lengthy and largely positive employment history at the employer, the arbitrator concluded Johnson’s suspension and termination were without just cause.

The district court recognized the deference due to arbitration awards, but determined that the arbitrator here had overstepped his bounds. Confirming the employer’s right to conduct a random test and issue an LCA, it rejected the arbitrator’s conclusion that Johnson’s LCA was unconscionable, since at the time it was entered into, Johnson had predicted he would fail the test, even though that prediction proved wrong. The district court relied, in part, on an Eighth Circuit decision noting that “normally last chance agreements are binding in arbitration.” It upheld the termination based on the LCA.

Eighth Circuit Decision
On appeal, however, the Circuit Court said the district court had read its earlier decision too broadly. The Eighth Circuit said “bargained-for” LCAs “superseded” a CBA’s just cause provision, and that an arbitrator “did not have authority” to ignore them. It noted that the earlier case’s LCA (1) “involved the union,” and (2) resolved pending disciplinary proceedings governed by the CBA’s grievance and arbitration provisions.

This case was different, the Eighth Circuit concluded. The union did not agree to the LCA between Johnson and the employer, and the LCA was the result of mutual mistake that Johnson had violated the employer’s drug policy — not the result of pending disciplinary proceedings. The parties thus correctly submitted the just cause-for-termination issue to the arbitrator, and under the CBA, the arbitrator properly focused his decision on that issue under the CBA. In the absence of language in the CBA defining “just cause,” the arbitrator’s broad authority to interpret and apply this term of the CBA entitled his decision to deference.

The arbitrator acted within his discretion in deciding that Johnson should not have been forced to sign the LCA, the Court ruled. Indeed, testimony from a senior human resources official suggested that under the employer’s policy, the LCA, with its “unyielding” termination provision, may have been inappropriate here; where an employee voluntarily admits to violating the drug policy other than on a day of a random test, practice indicated he was to be offered a “second chance agreement.” Finally, the arbitrator’s criticism for failing to investigate the employee’s claim that he had taken the wrong prescription prior to receiving a positive drug test result on his return-to-work test also was well within the arbitrator’s authority, the appeals court held.

However, the Court of Appeals declined to enforce that portion of the award directing back pay for the period of Johnson’s pre-termination suspension, since, it held, that issue had not been submitted to the arbitrator. Only the discharge was put in issue in the submission.

Concurring in the judgment, Judge Steven M. Colloton reasoned the LCA’s unconscionability, and thus its validity, was an issue for the arbitrator to decide, and not the court. While the arbitrator’s decision on the issue may have been debatable, confirmation of his award was called for. The judge dissented, however, from that portion of the majority opinion refusing to enforce the award regarding Johnson’s suspension. The suspension was premised on the same alleged misconduct as the employer cited to justify the LCA, and therefore, the arbitrator acted at least arguably within the scope of the submission by including a remedy for the suspension, the judge said. However, he also criticized the majority for suggesting that an LCA is not enforceable because an employee waives representation at the time of the agreement — “a broad and unsettled proposition that this arbitrator declined to adopt.” It was unnecessary to reach this issue, he contended, as the award could be upheld on narrower grounds.

This decision points to the need to proceed with care in using LCAs in the enforcement of substance abuse policies in unionized environments. The language of the LCA sanctions for its violation in relation to the CBA, the language of the written policy or nature of the practice relied upon, the need for or desirability of express union consent to the LCA, the need for drug testing in the face of employee admissions of substance abuse in violation of a substance abuse policy, and the investigation of possibly exculpatory assertions by the employee for apparent violations of the LCA, all are matters to be considered, along with limitations on the arbitrator’s authority. As this case demonstrates, the broad authority of arbitrators under many CBAs may make legal recourse difficult in the event of an adverse award.

Jackson Lewis attorneys are available to answer questions about this and other developments that affect employers. Please contact the Jackson Lewis attorney with whom you regularly work.
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