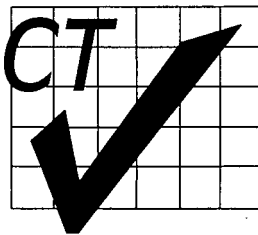


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# OFF-DUTY MISCONDUCT



It is a generally understood principle that a company may not discipline employes for what they do off duty.<sup>1</sup> As stated by the Board in Third Division Award 21293, "To do so would constitute an invasion of the employe's personal life by the company and would place the company in the position of sitting in judgment of neighborhood morals--a matter which should be left to civil authorities."

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*Discipline for off-duty misbehavior must balance the employe's right to lead his or her own life and a company's right to protect its interests.*

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**A**n exception to this principle permits discipline when the off-duty conduct affects the employer/employe relationship. Discipline for off-duty conduct then becomes a balancing of the employe's right to lead his or her own life and a company's right to protect its interests. As a general proposition, arbitrators agree that to the extent that an employe's off-duty conduct affects either his ability to do his job or the company's ability to run its business, the company may properly discipline an employe for that conduct. Generally it has been held that a company must meet **one** of the following three criteria:

1. The employe's behavior harms the company's reputation or causes loss of good will or causes an otherwise adverse effect on the company's business or operation.
2. The behavior renders the employe unable to perform his duties or appear at work, in which case the discipline would be based upon inefficiency or absenteeism.
3. The employe's behavior leads to the refusal, reluctance or inability of other employes to work with him.

**T**he first criterion is illustrated by Second Division Award 7031, in which the Board upheld the discipline of an employe who was also a local politician involved in a high profile criminal suit. The Board held:

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<sup>1</sup> The issue of off-duty use of alcohol and drugs has been the subject of its own body of awards. The principles involved differ from those discussed herein. The issue of charges stemming from off-duty drug and alcohol use will be the subject discussed in the next *Winning Edge*.

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"It is quite true, as the Organization asserts, that ordinarily employes may appropriately be disciplined for misconduct off the job only if some connection is shown between the misconduct and the employment relationship. Typically, these cases present a situation in which the employer's reputation or public image is negatively affected by association with the employe's notoriety. In our judgment, the record herein supports such a finding. Newspaper articles in the record describe the indictment, litigation and conviction of Claimant. In at least one such newspaper story Claimant was identified as a long time employe of the company. There is no doubt that under authority of several prior awards the company was justified in imposing discipline."

Another example of the first criterion is when the employe is off-duty but on company premises. Arbitrators have routinely held that off-duty employes have an obligation to observe company rules while on the company's property.

**A** common example of the second criterion occurs when an employe is incarcerated. If the company charges the employe with absenteeism or being absent without leave, arbitrators will in most cases uphold the discipline based on the company's need and right to have its employes on duty in order to conduct its daily operations. Third Division Award 18816 upheld this principle as follows:

"Where there is an apparent violation of Rule 404 [Employes must not absent themselves from duty...without permission from their superior.] by a Claimant who is incarcerated and unable to notify Carrier of his inability to report to work, in order to be relieved of the consequences of such violation Claimant must have a plausible explanation of events that might lead a reasonable man to deduce that incarceration was not primarily the result of Claimant's own wrongdoing."

*If, however, the company charges the employe simply with being arrested, the Union will in many cases prevail.* Arbitrators have held in such instances that the fact that a person is arrested and charged with a crime does not mean he is guilty. In Award 14 of Special Board of Adjustment No. 1024, the arbitrator made just such a ruling. Note that the arbitrator also held the company's assertion (that the Claimant's arrest subjected the company to loss of goodwill) was

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unfounded due to the Claimant's low profile position with the company. The arbitrator ruled that:

"The Board must uphold the Organization's...objection that it was improper for Carrier to dismiss Claimant [because he had been arrested and charged with a criminal offense]. It is a fundamental principle in our society that a criminal charge is merely an allegation. A person's arrest and subsequent criminal charge do not necessarily mean he is guilty. Consequently, Carrier clearly was not justified in discharging Claimant on that basis. Moreover, Claimant was only a Baggage man and he was off duty. Therefore, Carrier's conclusion that his arrest and criminal charge subjected it to a loss of goodwill...was not warranted...The Board does not condone Claimant's off-duty conduct in this situation, but this is not the reason Carrier stated he was disciplined."

**T**he arbitrator in Second Division Award 9120 explained the third criterion this way:

"The issue here is does Carrier have the right to dismiss Claimant for a criminal act committed off its property and on Claimant's own time. This Board has been faced with numerous cases involving the same issue involving a variety of crimes. We have come down on both sides of the issue, depending on the severity of the crime, the impact on Carrier's good name, and the **possible impact on other employees of Claimant's presence on the property.**" (emphasis added)

"In the instant case, we think that Claimant's continued presence on Carrier's property would pose a threat to his fellow employees and that Carrier would be faced with possible liability if Claimant displayed the same lack of control on the property as he did during the shooting incident."

Critical is the principle that the outside activity *must* adversely affect the company. If a company brings discipline against an employee concerning that employee's off-duty conduct, neutrals have held the company to a higher standard than they would be required to meet in discipline cases involving on-property conduct or action. It is not enough for a company to merely assert that one or more of these criteria have been met. One Arbitrator spoke of the company's burden when he stated in Third Division Award 20874:

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"The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs...mere speculation as to adverse effect upon the business will not suffice. Each case must be measured on its own merits. (See also, Elkouri & Elkouri, *How Arbitration Works*, 3rd Ed. B.N.A., Inc., Wash. D.C. 1973, pp. 616-618.)

As in all discipline cases the burden of proving the charges is on the company. If you encounter a discipline situation in which the company has brought charges against an employe for off-duty misconduct, keep in mind the three criteria listed here. Approach the investigation with two goals in mind: to make the company *prove* that the employe was guilty of the off-duty misconduct he or she was charged with, and to make the company *prove* that the off-duty misconduct had an adverse impact on the company's operations.

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