

## **Common Sense Prevails: Arbitration Award OK'ing On-Duty Drug Usage Overturned**

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### **Working Together**

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In the world of labor arbitration, common sense sometimes takes a holiday. Fortunately, a Superior Court judge recently overturned an arbitrator's attempt at second guessing an employer's response to serious misconduct involving on the job drug use.

In *State of Connecticut v. Connecticut Employees Union Independent*, 2014 WL 5572251, a skilled maintainer at the UConn Health Center was terminated after being arrested for smoking marijuana in a state owned vehicle while at work. The employee's union grieved the termination. The arbitrator found that the grievant deliberately took marijuana (and a pipe) with him to use during work hours. The arbitrator further found that 1) the State had valid safety and security concerns regarding the grievant's on the job drug use in light of his job duties, and 2) the grievant's alleged "stressors" resulting from his personal problems did not mitigate his misconduct.

The arbitrator agreed that the grievant's conduct was a substantial workplace violation which required a significant penalty. The arbitrator noted that the employer's rules, including its Drug and Alcohol policy, cite termination as a potential penalty, and employees are warned that termination could result from a **first time** offense. Nevertheless, the arbitrator somehow determined that there was not "just cause" for termination, since termination was not "within a proper range of progressive discipline." The arbitrator subsequently modified the termination penalty to a six-month, unpaid suspension effective from the date of the grievant's removal.

The State then sought to vacate the arbitrator's award on the grounds that the award violated a public policy against drug use while on state duty (and operating a state owned vehicle). The Superior Court agreed that there is such a well-defined public policy and overturned the arbitrator's award, as the award improperly reinstated a state employee whose conduct blatantly violated a combination of criminal statutes **and** important employment regulations. The Court noted that the progressive sanction of reinstatement suggested by the arbitrator "would send the message that stress experienced in one's personal life somehow excuses the use of marijuana in the workplace."

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The Court rejected the Union's claim that termination is improper in light of disability discrimination and accommodation mandates, noting that the grievant was **not** discharged *because* of his subsequently diagnosed depression and anxiety; rather, his dismissal was based on his use of a controlled substance while on duty. The Court also rejected the Union's attempt to rely upon the legalization of medical marijuana. The Court noted that there was no indication that the grievant was prescribed marijuana, or that it was medically necessary for him to use marijuana to treat his depression and anxiety.

***What does this all mean?*** In general, a party seeking to overturn an arbitration award has a tough burden. It is more problematic when the courts seemingly send mixed messages. As noted by Attorney John Shea in these pages, the Connecticut Supreme Court recently 1) overturned an arbitration award that reinstated an employee terminated for serial sexual harassment, but 2) determined that lying by a police officer with regard to his alcohol abuse and epilepsy during a "fitness for duty" medical examination was not cause for termination. Trying to divine a universal message for public sector/unionized workplaces from these rulings may seem difficult, except narrowly noting that 1) sexual harassment and (maybe now) on the job drug use may "shock the courts' conscience" and almost demand termination, but 2) depending on the nature, degree, and motivation, lying (even by a police officer) does not.

While courts may be more reluctant to disturb arbitration awards that are more forgiving of **off-duty** usage of drugs, the Court here stood behind an employer who believed that **on-duty** usage is inconsistent with its mission. The Court also properly rejected an attempt to blur employee misconduct with an after the fact diagnosis of a disability, along with an attempt to somehow treat the medical marijuana statutes as a proverbial "get out of jail free" card for drug related misconduct. **PLEASE NOTE:** the Union has filed an appeal of the Court's decision with the Appellate Court, so stay tuned.

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