

What Should Union Have Done Differently as to Drug Testing Grievance?



SITUATION

A union member's found sleeping in his work vehicle. A co-worker tries to wake him and as he groggily stirs, the vehicle starts rolling forward. The member quickly puts it in park and promptly falls back to sleep. After the co-worker makes a few more attempts to rouse the member, he fully wakes and drives off haphazardly, nearly hitting the co-worker. The collective agreement permits drug testing when a worker's involved in a 'near miss.' Such testing is to be performed orally with a swab rather than through a urine test. A few hours after this near miss, the employer asks the member to take a urine test. The member objects and calls the union's lawyer, who tells him to take the test. He does and the test results are negative. The employer fires the member anyway and the union files a grievance on his behalf, claiming the termination lacked just cause and the form of testing violated the collective agreement. The employer claims the member, who admitted to a supervisor that he couldn't pass a drug test, cheated on the tests by using urine he got from another worker. Witnesses support the cheating accusation. The union's lawyer reviews the member's concerns and the evidence, including witness statements and the drug testing terms in the collective agreement, and recommends that the union not pursue the grievance because success is unlikely. So the union drops the grievance in its entirety.

QUESTION

What did the union do wrong'

- A. It dropped the grievance regarding the termination.
- B. It didn't challenge the employer's improper demand for a drug test.
- C. It dropped the grievance as to the form of drug testing.
- D. Its investigation was inadequate.

ANSWER

C. The union should've continued its grievance challenging the employer's violation of the collective agreement by requesting a urine test rather than an oral swab.

EXPLANATION

This hypothetical is loosely based on an Alberta Labour Relations Board decision, which held that a union didn't act arbitrarily in deciding not to pursue a member's grievance regarding drug testing and a subsequent termination disguised as a layoff. The board found the union's decision not to pursue the grievance as to the termination reasonable based on the findings of its investigation. But the board said the union should've continued its challenge of the employer's use of a urine test rather than the oral swab test because the form of drug testing had been specifically negotiated into the collective agreement. The board noted that the oral swab test detects drugs for a shorter duration than a urine test and the 'method of testing was a significant issue for the Union's membership.' Therefore, the board said the union failed to enforce the collective agreement.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because the union didn't do anything wrong in deciding not to pursue the grievance as to the member's termination. A union is only required to make a reasonable decision and not act in an arbitrary, capricious or discriminatory manner or in bad faith. Here, the evidence indicated that the member fell asleep in a work vehicle and nearly injured a co-worker when he haphazardly drove away. He then cheated on the subsequent drug test. Because the success of any claim that termination wasn't for cause was unlikely, the union made a reasonable decision not to pursue that aspect of the grievance.

B is wrong because the employer was justified in asking the member to submit to a drug test. In general, an employer can require drug or alcohol testing after a safety incident, especially if there's reasonable cause to suspect the worker might be impaired. And in this hypothetical, the collective agreement permitted drug testing after a near miss. The facts also indicate the member was asleep in a vehicle and nearly ran over a co-worker after being awakened. The facts support a reasonable suspicion of impairment and so there was reasonable grounds for the union not to challenge the employer's demand for a drug test.

Insider Says: For more information about drug and alcohol testing, see 'Drug and Alcohol Testing, Part I: What are the Legal Limits on Testing Policies'' July 2010, p.1.

D is wrong because the union *did* properly investigate the matter. The union's lawyer considered the member's concerns, took into account the statements of witnesses involved and reviewed the collective agreement and its drug testing terms. Therefore, the union's investigation collected all the relevant information, which revealed the member's complaints were unlikely to succeed because of uncontradicted evidence of his dishonest conduct.

SHOW YOUR LAWYER

Complainant v. Int'l Union of Painters and Allied Trades, Local 177, [2014] CanLII 51386 (AB LRB), Sept. 4, 2014