

RESOLVING DRUG ISSUES

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Preface

Several years ago the authors outlined their thoughts on possibly preparing a fifth edition of their book *How Arbitration Works*, one thought being for: "A new topic or chapter on drug and alcohol issues in arbitration. This would be a relatively short coverage, possibly about ten pages in print." This was one of the thoughts that the authors communicated to BNA Books at the time. As is explained below, *Resolving Drug Issues* is the product that ultimately evolved from that thought.

The authors decided to prepare the proposed new topic or chapter as their first actual writing toward a possible fifth edition of *How Arbitration Works*. At that time they had completed much research for a fifth edition and they realized that an outpouring of decisions and other writings had been published on drugs and drug testing in recent years.

Very soon after commencing to write, it was clear that many more than 10 printed pages would be required for a new topic. It accordingly would be a chapter. But that decision did not hold for long either, as it soon became clear that the material could best be utilized in a separate book. Also, the book would relate primarily to drugs and drug testing. There was plenty of material for that alone.

The first proposed title for the book was *Arbitrating Drug Issues*. But in time that title seemed too narrow. While all of the material that was being written would be potentially relevant for arbitration proceedings, much of the material would be useful also in other areas and settings. The title *Resolving Drug Issues* was thus ultimately selected for the present book.

A number of useful books have been published on drugs and drug testing. Certainly, the subject is of such great importance to our society today that the thoughts of many different writers can make a contribution and need to be heard. The present authors have found the subject area to be very challenging and fascinating when once confronted, just as other authors no doubt have found it to be in the past and still other authors will find it to be in the future.

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The authors also thank the Editorial Advisor for the Oklahoma Law Review, who filled the role of arbiter where the authors disagreed about some question of punctuation, tense, adjective use, or such. In this regard, the authors thank the BNA Books Editor who, in fact, may have had the final say in many such matters.

To all of the stated categories of professionals, the authors acknowledge the contributions they made to the book.

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Chapter 1

The Setting: Then and Now

LW was a bus driver. In prior years he had received awards for safe driving. But in early 1948 LW began to create something of a dilemma for his public transportation company employer. In several instances between early 1948 and October of that year, LW reported for work in a condition that suggested to company officials that he was under the influence of alcohol or some drug. The condition was particularly puzzling, however, since no one detected any odor of alcohol coming from him and there was no noticeable impairment of his muscular coordination. On the other hand, there was a glassiness in the eyes, a flushing of the face, and a thickness in speech. The officials were seriously concerned about entrusting LW with driving company buses.

At some point the officials consulted the company doctor about the matter. He indicated that a physical examination would not enable one to ascertain the use of a drug unless the person used it habitually. Although LW was warned in May 1948 that a recurrence of the condition would result in his discharge, he in fact was not discharged when he reported for work in the odd condition several times in the next few months. When this failure of the company to act was questioned later during arbitration proceedings, the company explained that it had wished to be extra fair to LW in view of its own uncertainty as to the true nature of his condition. The arbitration proceedings were held to review the company's action in finally discharging LW after he once again had reported for work on October 20, 1948, appearing to be under the influence of alcohol or a drug; the company had

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then concluded that it no longer could tolerate the risk of his condition.¹

Looking back years later, many persons may believe that all in all, 1948 was a very good year. We had survived the Great Depression and had gotten through World War II. Also, in 1948 we had one of our better presidents, Harry S. Truman. Of course, the country did have some things to worry about. The Cold War was under way, to mention one problem. The disregard or outright denial of civil rights was another area of serious concern to many. There also were other domestic problems that needed to be confronted. But pervasive drug abuse still had not arrived to haunt our society. That would come some years later.

The comparative insignificance of drug abuse as a problem for American employment in 1948 is reflected by the dearth of arbitration decisions involving discipline for drug offenses among the hundreds of arbitration discipline decisions that were published in 1948 or earlier. LW's case was one of the first drug cases, if not the first, to appear in published arbitration reports. It was published after his grievance was arbitrated in 1949. (There previously had been many published arbitration decisions involving alcohol, which is not one of the substances included within the term "drug" as that term is used in this book.)

In contrast, many arbitration decisions involving drug discipline and other employment drug issues were published in the 1980s, and there also were many court decisions dealing with such matters during that decade. The picture had indeed changed. The somber situation that had evolved and now confronted America in regard to drug abuse was underscored by the Supreme Court's 1989 declaration that there could be no doubt "that drug abuse is one of the most serious problems confronting our society today," and by President Reagan's public polls revealing that drug abuse was the number one concern of Americans.²

¹The case is *Wesson Co.*, 12 LA 386 (Blumer, 1949).

²The Supreme Court statement is from *Treasury Employees v. Von Raab*, 109 S. Ct. 1384, 1395, 4 IER Cases 246 (1989); the reference to President Reagan's public polls is from "Drug-Testing Disputes," in *PROCEEDINGS OF THE 43D ANNUAL MEETING OF NAA* 235, 237 (1991). One factor that is recognized as having contributed to the plague of drug abuse in America was our involvement in the Vietnam War. A legacy of that war was the importation of much additional drug abuse into the United States by American soldiers who had been introduced to heroin and other drugs while serving in Vietnam. In this general connection, it has been explained that: "Drug