The KVP Award on Company Rules

Quite often, I receive calls from stewards and members informing me that the employer has notified them that they are instituting a new policy. Frequently, this is followed by the question – "Can they do this without discussing it first with the Union?"

In answering this question, we must first discuss "management rights". Management generally adheres rigidly to the position that residual or reserved powers are a management right unless its right has been limited by some specific provision of the collective agreement. In other words, the employer is generally free to do what they wish unless it is specifically restricted by some clause negotiated into the contract.

While some arbitrators have spoken in terms of a specific contractual provision as being necessary in order to limit management's rights, other arbitrators have taken the view that limitations upon management rights are not necessarily restricted to those contained in some specific provision of the agreement. They may be "implied obligations" or "implied limitations" under some general provision of the agreement such as the recognition clause, or seniority provisions.

Arbitrators also tend to modify the residual rights theory by imposing a standard of reasonableness as an implied term of the agreement. Certainly, many arbitrators are reluctant to uphold arbitrary, capricious or bad faith managerial actions which adversely affect bargaining unit employees. It should also be noted that even where the agreement expressly states a right in management, or gives it discretion as to a matter, management's action must not be arbitrary, capricious or in bad faith.

In order to avoid having a policy considered to be arbitrary, capricious or in bad faith, some employers will take the opportunity to discuss a new policy with the Union before implementing it. In this way, they can test the waters and determine what the policy's reception will be and whether they need to make modifications. However, not all employers are prepared to follow that approach and they may act unilaterally.

As a Union, it is very important to keep apprised of an employer's policies as breach of company rules or policies is often cited as grounds for discipline. As mentioned, employers do have the right to develop rules and policies for the workplace and they are not necessarily required to gain input or agreement from the Union or the employees in implementing them. However, this is not a completely unfettered right and they can sometimes lead to grievances. The classic arbitration decision setting the guiding principles relevant to a review of an employer rule is ***KVP Co. Ltd.*** (1965), 16 LAC 73. The basic principles are:

1. Employers have the right to issue a wide variety of rules, as long as they are not in conflict with the collective agreement (as well as relevant legislation).
2. Rules must be reasonable and easily understood. They must be made known to employees and administered fairly and consistently.
3. An employer cannot rely solely on employer rules in meting out discipline. Rather, the

employer must demonstrate that the discipline was for just and reasonable cause.

This being said, a Steward should look at any rule or policy being unilaterally implemented by the Employer to determine if it satisfies certain requirements. If they don't, then grievances may result from the employer acting upon these policies or rules. In reviewing a policy or in determining if discipline for a breach of a policy is grievable, stewards should ask themselves if the rule or policy:

1. **Is consistent with the collective agreement?** If it contravenes explicit language or the principles found in the contract, the employer would be prohibited from enacting such a rule. The determine this, Stewards should review the principles of contract interpretation that I wrote about in our last Spotlite.

2. **Is reasonable?** In determining if a rule is reasonable, an arbitrator will generally assess the extent to which the rule is necessary to protect the legitimate business interests of the employer and its ability to operate in a safe and efficient manner. This test is entirely dependant on the actual type of business the employer is involved in. For example, a rule prohibiting employees from having facial hair would be unacceptable at a retail outlet but might be found to be reasonable in a facility that required employees to wear respirators on a regular basis and the facial hair would prevent a proper seal of the mask.

3. **Is clear and unequivocal?** The purpose of a rule or policy is to communicate an expectation to the employees. If the rule written in such a manner as to be confusing or open to misinterpretation, then that will leave open a defense that the employee did not understand the rule and was therefore not aware that they were in violation. Many discipline grievances have been won on this principle.

4. **Has been brought to the attention of the employee affected before the company acted upon it?** This is basic common sense, any rule that an employee cannot reasonably be expected to be aware of, cannot be used as grounds for discipline. However, members should also be aware that if the employer advises that they have a policy manual and provides opportunity for employees to have easy access to it then they may have met this requirement.

5. **Has the employee concerned been notified that a breach of such rule could result in his discharge if the rule was used as a foundation for discharge?** This is one of the basic tenets of the rules of progressive discipline. Not only do employees need to know what is expected of them but they must also know what may be the consequences of not meeting those expectations.

6. **Has the rule been consistently enforced by the company from the time it was introduced?** If an employer has a rule but does not consistently enforce it, they are giving a mixed message. This can lead to a defence that the employee thought it was no longer in effect or that the employer is being arbitrary or discriminatory in its application of the rules. It can also lead to an argument about the reasonableness of the rule. If it is necessary to protect the legitimate business interests of the employer and its ability to

operate in a safe and efficient manner, why doesn't the employer ensure that the rule is consistently applied?

Generally speaking, policies and rules that are unilaterally implemented by the employer only become the subject of grievances when the employer relies upon them as just cause for discipline of some sort. In some cases, these rules may be challenged before they are acted upon by the employer however, before making a decision to do this, you may want to determine if that is the best strategy. In discipline cases the burden of proof rests with the employer in justifying their actions. That is not the case when challenging the reasonableness of a rule.

As well, a pre-emptive grievance relieves the employer of the requirement to show that they have advised the employees of the existence of the rule and the consequences of non-compliance. It also removes any argument that the employer is not enforcing the rule consistently. Essentially, the Union is challenging the rule with less than half of its arguments. One should have very definite reasons for following such a plan of action because to do so and to lose could result in the rule becoming much harder to dispute at a later stage.