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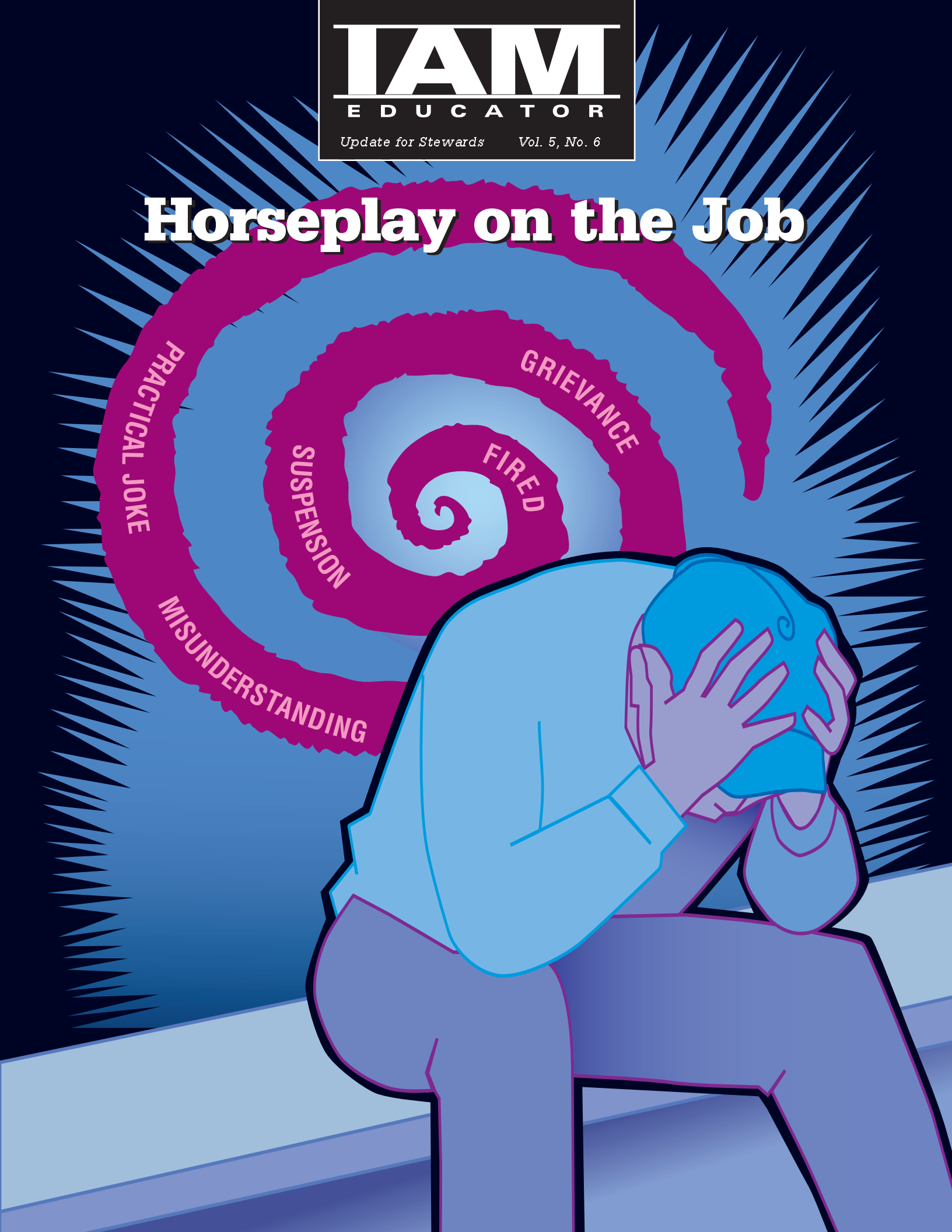
Horseplay on the Job



Horseplay on the Job

Daily life on the job can be boring. After all, once you've learned the work routine, there's frequently energy left that can be used for more interesting activities — like, maybe, practical jokes. These stunts are commonplace on the job, and form a means by which life can become more interesting, at least for a moment.

Practical jokes are one thing: their rowdy cousin, horseplay, can be quite another. In general terms, horseplay tends to involve a more physical kind of "joke," one that the person on the receiving end — and the boss — may not view as funny, or may be taken wrong. Or both.

The problem is that the target of the "joke" may be in a bad mood on a particular day, or the "joke" may focus on someone who is not in the mood for it. Or, the "joke" gets out of hand, leading to an altercation in which words or even fists may fly. The result: a discipline or discharge. What started out in the perpetrator's mind as a joke ends up in the steward's lap as a grievance.

Nearly all workplaces have rules that make horseplay an offense punishable by discipline or discharge, so any steward looking to avoid having to deal with a headache down the road might want to offer a little preventive advice to any known jokester in the vicinity. Bad things can happen if their humor goes bad. While it's not the union's job to maintain workplace discipline, common sense says that if you see something heading your way that can get a co-worker in trouble, you might want to think about doing what you can to make sure it doesn't get out of hand.

What do you look for? Well, here are a few recent examples of "jokes" that went bad, ending up in arbitration:

Peeing on the Floor

For some reason, a worker thought it would be funny to urinate on the men's break room floor. His workmates didn't think it was funny, nor did management: he was fired on the spot, and the arbitrator agreed with the company. He said that employees eat and rest in the break room, and the worker's conduct violated a company rule stating that indecent conduct may result in discharge.

Topless Trouble

A female employee used the employer's photo equipment to take pictures of her bare breasts. She did not have permission to use the equipment, and the company discharged her. The arbitrator didn't agree with the company, reducing the penalty to two months without pay. He said the discharge was "excessive" for horseplay, the pictures were not "obscene" under law, she did not commit sexual harassment, and suspension was more appropriate, sending a signal that the grievant's misconduct was not condoned.

Bodily Harm: Threats

A worker threatened another employee with bodily harm three times over a five-day period. Management fired him. The grievant claimed it was just horseplay, but the arbitrator upheld the company's action. He said the employee had been disciplined before for threatening another worker; he admitted to having used nearly all of the specific threatening language that had been alleged; another employee had been fired for similar threatening behavior; and the grievant was not entitled to "justice and dignity" after what he did to another employee.

Bodily Harm: Thrown Object

A worker threw a sledge hammer in the general direction of other employees; it bounced off a parts tub and injured someone. The culprit was fired, but the arbitrator reinstated him without back pay, noting that the employer operated a plant where horseplay was excessive; it was his first offense; he had a clean work record and expressed remorse to the injured worker; the struck worker had not been targeted and would not have been hit were it not for the ricochet, and the act was horseplay, which under the work rules called for progressive discipline.

Bodily Harm: Wrestling

A worker picked up another employee and slammed him down on a table, then grabbed and wrestled to him to the ground, pinning him while another worker joined in the "horseplay." The company fired him, but the arbitrator reduced the penalty to a last chance agreement, even though he was already working on a last chance agreement from an earlier incident. The arbitrator said that the previous four disciplines had already been reduced to level three under the company's discipline system, and the other employee received discipline one level higher than those previously imposed.

Making jokes at other workers' expense is questionable at any time, but especially so when it gets into roughhousing or threatening behavior. If you as a steward have to defend a worker who has committed horseplay or practical jokes, be aware of the employer's rules that deal with the offense. Best of all, avoid disciplines and discharge situations by warning employees who may have gone too far in their "jokes" before they get in trouble, especially those who have gotten into trouble before.

— George Hagglund. The writer is Professor Emeritus at the School for Workers, University of Wisconsin – Madison.

Using Information Requests Tactically

Your employer's legal obligation to furnish all kinds of information to the union relating to bargaining unit members' interests is quite broad in scope. But since — no surprise here — many employers initially resist handing over the documents or other information the union seeks, it's worth thinking about some tactics to use when making these requests.

n Always either initially submit your request in writing or confirm your oral request in writing. There's no need to give the employer an opening to raise a phony issue about what you really asked for. And having your request in writing protects you later on if the employer hasn't turned over everything that's responsive to your request.

n Make your request continuing in nature ("Please provide any new information that comes to light after your initial response to this request.") This way you're covered if any new information comes up in the meantime, information that you'd want to have when you show up at the arbitration hearing, a bargaining session, or other meeting.

n It's best to make sure that your request is openended. Include with your request the words, "The union reserves the right to ask for additional information pertaining to this concern." This way the employer can't try to wriggle out from under a subsequent information request you might make relating to the same topic.

n Specify that the various items you ask for in your request are severable, that this isn't an all-or-nothing request. You could write, "Please provide information that is available as soon as it is practicable to do so; the union will accept a partial response to this request without prejudice to its position that it is entitled to all documents and information requested." This way the employer can't stall, withholding all the information you're seeking until everything is located and assembled.

n You may want to anticipate and preempt certain employer defenses in your initial request. For example, the law says that confidentiality may be grounds for nondisclosure, but that legitimate needs for confidentiality must be weighed against the union's need for the information. So you may want to clearly assert at the time you make your request why it is that the information sought is so important to the union. Or you can preempt an argument about confidentiality by agreeing up front that the employer can black out names or other identifying information from the documents it turns over, or you can submit written privacy waivers from the individual employees along with your request.

Think about using an information request to lock in employer positions.

n Consider which is the right tool for the job. For a given piece of information you seek, it may be the case that you can get the relevant records either from your employer or from another source (such as a governmental agency that has the information on file.) Think about whether giving your employer a heads up as to what you're investigating might give them a chance to cover up or circle the wagons. Or perhaps the opposite is true: letting them see that you're on to something might cause them to reconsider their course of action.

n Since often you will have the choice of invoking either a contractual right to information or a right under a statute, work through whichever forum (grievance arbitration, labor board, or perhaps a court of law) might be best to enforce your rights. You'll want to think through the time frames involved using each method, cost of any necessary enforcement action, and other practical considerations.

n Think about using an information request to lock in employer positions. If you ask for the reasons the employer took some action, or the evidence they relied on in making some decision, they'll have a hard time later on if they want to come up with some other justification for the action they took.

n See what leverage you might be able to gain by using an information request. A request that would be particularly burdensome to the employer — taking up a lot of time to search for records, for example, or revealing information the employer hopes won't see the light of day — can be used as a bargaining chip. You could find yourself in position to say, "If you drop your plan to do X, we'll then have no need to pursue our information request."

n If you're bargaining in a jurisdiction where the employer can impose terms and conditions once an impasse in negotiations is reached, information requests can be a valuable technique to avoid impasse. This is because if there's a pending information request, then legally no impasse can exist. (And keep in mind that there are no time frames for when in the course of negotiations information requests have to be submitted.)

Just one caution, though, about the tactical use of information requests. Be careful; some of these tactics run on a two way street. Employers generally can make requests for information to the union, so be aware of the risk that the other side will try to be as clever and crafty as you now have learned to be!

— Michael Mauer. The writer is a labor lawyer and author of The Union Member's Complete Guide.

Helping Returning Veterans

When the wars in Afghanistan and Iraq began, the problem for stewards was how to protect the rights of union members called to active duty. As the fights drag on, a new, more complicated challenge arises: protecting the rights of returning veterans. New laws, the lack of precedents in many workplaces, and the sheer number of returning veterans makes this issue a stiff test for every steward.

The returning U.S. veteran is covered by a series of overlapping, and occasionally conflicting, provisions in union contracts and in federal law, requiring that stewards become more knowledgeable about applicable laws and look more carefully at the union contract.

(In Canada, which is part of the NATO war in Afghanistan, only three provinces have laws that protect jobs of reservists — Manitoba, Saskatchewan and Nova Scotia. On the national level, there's talk of pushing action on job protection — the Senate has already passed a motion urging it — but at the moment only federal civil servants are protected by legislation that allows them a one-year leave from work for military duty. Another, seldom-used, law protects reservists called up in national emergencies.)

The Basic Law: USERRA

The U.S. federal law covering all returning veterans, even if they were members of a state National Guard, is the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA), administered and enforced by the U.S. Department of Labor. The law protects anyone who provided notice to the employer prior to beginning military service, has been honorably discharged, and reports back to work in a timely manner.

As soon as a returning veteran notifies the employer of a desire to return to work — hopefully, with the same notice to his or her union — start making sure all aspects of USERRA are enforced.

The most important section of this law requires an employer to reinstate a worker to "a previously held job or to a comparable position with the same status, seniority and pay," because the employer cannot consider time spent on active duty as a break in service.

Beyond this protection, a wide variety of contract issues can arise. So can legal issues that can be defended through the grievance procedure instead of waiting for the Department of Labor to show up.

What's "Comparable"?

If the boss says the veteran's job no longer exists, what is a "comparable" job? While "comparable" usually involves pay rates, other factors — overtime availability, shift preferences or job location — should also be defended by the steward. This important issue can be pursued — with demands for back pay — through the grievance procedure. Be ready for complications: for example, what if a return to a previously held position requires bumping another union member out of the spot? A good steward should try to find a way to keep both workers in the position, or to protect the pay rate of any worker displaced by a returning veteran.

A further complication arises when returning members suffer from physical disabilities. USERRA requires expanded protections for disabled veterans, so employers are required "to make reasonable efforts to accommodate the disability." A disabled veteran has up to two years to return to the job, and if he or she is unable to perform a previous job, the employer must make the "reasonable effort" to find a suitable position. As every union steward knows, the word "reasonable" can be a battleground and there may not be any precedents under the contract.

A more complicated issue for the steward is a veteran silently suffering a disability like Post Traumatic Stress Disorder, whether diagnosed or not. PTSD may bring the returning veteran into the grievance procedure if there is "excessive absenteeism," "bad work" or "erratic behavior." A steward should pay attention to possible issues when investigating grievances or can encourage the veteran to seek help with the Employee Assistance Program before a situation turns tragic.

Back Pay

How about back pay? Anticipating a short-term absence with a state National Guard, many union contracts require that the employer pay the difference between Guard pay and the worker's salary. What happens if the call-up lasts for 18 months, instead of the usual two weeks? Unless there is a time restriction in your union contract, demand full pay for your member. This demand, based on your contract, is another great argument in favor of union representation: federal law *encourages* but does not *require* an employer to make up the difference between regular pay and military pay.

Another tricky area is the federal requirement that a worker's time on active duty not be considered a break in service, so an enlistment period must be considered "service with the employer" for the purposes of pension vesting and benefits.

The steward's role is more urgent because of the alleged failures of the Department of Labor to enforce USERRA. A report in November, 2007, found that 44% of reservists were unhappy with the way the DoL handled their complaints under USERRA.

In years to come, stewards and federal courts will be handling many new cases for returning veterans, and precedents and practices will eventually become settled. For now, the steward stands as the first line of defense. If you have trouble getting an agreement with the boss over these issues, rally your co-workers and the community to support the returning veteran.

— Bill Barry. The writer is director of labor studies at the Community College of Baltimore County

Drug and Alcohol Testing

Just as children tend to get sucked into the latest craze — Hannah Montana or Webkinz, anyone? — employers can be caught up in the management craze of the moment as well. One of the hottest of those today is the drug and alcohol testing fad. But while a decision by the boss to start collecting Star Trek figurines wouldn't affect you, his fascination with monitoring the lives of the workforce can spell real problems for everyone.

It's pretty remarkable, when you think about it. Employers who routinely demand mandatory overtime, resist efforts to deal with repetitive stress injuries in their workplaces, or regularly expose people to highly toxic substances all of a sudden profess concern for the health and welfare of their workers and subject them to mandatory drug and alcohol tests.

Testing Is Usually Negotiable

Keep in mind that the only place drug and alcohol testing is legally *required* in the U.S. is for workers performing "safety sensitive functions" in transportation industries under the Omnibus Transportation Employee Testing Act of 1991. If your workplace isn't required by law to have a testing program, and you've escaped the demands so far, remember that it's a negotiable issue. If a policy is already in place and your employer wants to change it, that's negotiable as well.

And remember, especially if there's no testing policy at your workplace today but your employer decides it wants one, there's no real reason to even *have* one. Employers already have the right to discipline for just cause, and being drunk or high on the job counts as just cause. Education and employee assistance programs have been found to be effective in dealing with workplace drug and alcohol abuse. There are *no* data to support the effectiveness of drug testing.

If for whatever reason you can't avoid implementation of a testing program at your workplace, here are some basic elements the union should fight for in negotiations:

- No random testing.
- Testing for "just cause" or "reasonable cause" only. These can be defined as slurred speech, inability to walk straight, erratic behavior or other visual signs that would cause a reasonable person to believe the worker was under the influence of some substance.
- If a worker admits to a problem, there should be no testing. The only discussion should be about whether a rehabilitation program is necessary.
- The union should fight for language that says what is unacceptable is *on-the-job impairment*. It is not the employer's place to monitor off-the-job conduct. In one case where the employer insisted on the right to respond to off-the-clock drug use, the union countered with a demand that it be able to test the employer and supervisors for immoral acts they might take part in outside the workplace. One proposal was that all management personnel take lie detector tests to see if they were racists. The employer soon agreed that testing would take place only if the employees showed evidence of on-the-job impairment.

If a Test Is Demanded

If a testing procedure is in place, what should the union do when a worker is directed to take the test? The first thing to do is demand to be notified and to be present, if the employee consents, when the test is administered. But even before that happens, ask and document the answers to these questions:

- Why does the employer want to test this employee?
- What are the consequences for refusing to submit?
- How will confidentiality be protected?
- What are the consequences of a positive test? Will a second test be given?
- Will the employer provide you with a copy of the laboratory report?

Remember that *no* drug test is 100 percent accurate. Some labs have been found to have false-positive rates as high as 66 percent!

If a worker tests positive and is disciplined, stewards should be prepared to raise a number of issues and defenses. These include a lack of probable cause (perhaps the erratic behavior can be explained: get a statement from the worker when the issue first comes up); citing deficiencies in the employer's or the lab's procedures; or charging the test result to be a "false positive" due to a prescription drug, over-the-counter medication, or passive exposure.

If a worker has a drug or alcohol problem it should be everybody's concern to help him or her get through it — not by taking away a much-needed job or by exposing the worker to humiliation and censure, but by doing everything possible to help.

— Adapted from the UE Steward Handbook, *published by the United Electrical, Radio & Machine Workers of America.*

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Dear Sisters and Brothers:

First, I would like to take this opportunity to say "Happy New Year," with the hopes that the year ahead brings good health and cheer to you and your families. The holidays are a time to enjoy family and friends and start fresh on a new year.

One New Year's resolution we can all make is to participate in the 2008 elections. We have a great opportunity to change the direction of this country and put someone in the White House who will help rebuild America's middle class. Too many of our Brothers and Sisters have suffered the loss of their job, more expensive health care, a less secure retirement or trying to figure out how to pay the ever increasing costs for their kids' education.

The first place to start on your New Year's resolution is to participate in your state's presidential primary or caucus. By the time you receive this edition of the IAM Educator, some states will have already held their presidential primaries or caucuses. But thousands of IAM members can have a huge impact on the Democratic and Republican presidential nomination when almost two-dozen states hold primaries and caucuses on February 5, 2008.

Our union made an historic dual endorsement of Senator Hillary Clinton for the Democratic nomination and former Arkansas Governor Mike Huckabee for the Republican nomination. Your efforts on their behalf can tip the scales and ensure the 2008 presidential candidates will support working family issues.

Your role in the election is critical. You can provide voter registration information and be the voice of our union on the shop floor to educate our members about the candidates we have endorsed. It's one New Year's resolution you'll be glad you kept.

And for your role as Steward, in this issue of the IAM Educator you'll find advice on using information requests to the employer tactically; how stewards can help returning veterans on the job; how to deal — and negotiate — terms for employee drug testing; and how to warn members before "horseplay" goes too far.

I hope you had a joyous holiday season and I wish you a prosperous New Year. And, thank you for all you did in 2007 and will do in 2008 as a steward in our great union.

In Solidarity,

R. Thomas Buffenbarger

R. Thomas Buffenbarger
International President

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