YOU'RE FIRED!

Or are you? It depends...

IMAGINE THAT YOUR orchestra manager calls you into the office one day. "You missed that high 'G' one too many times," he tells you. "You're fired." Is this legal? Does it matter if this is a union or non-union situation?

One of the most significant benefits that a union contract provides to workers is job security. This is a point that I emphasize whenever I can. In most non-union circumstances, workers are considered "at will." This means that they are employed at the will of their employer and can be discharged for any reason so long as it does not violate specific statutory provisions, such as the civil rights laws that prohibit discrimination due to gender, age, disability or religion. Provided no statute is violated, workers who are "at will" may be terminated for any reason – good or bad – without legal recourse.

In order to obtain job security, two basic words – "just cause" – must be inserted into a contract when it is negotiated. While at first blush the phrase "just cause" does not seem significant in and of itself, they are two of the most important words that a labor agreement can possibly contain. Once included in an agreement, a worker may not be fired unless an employer has a legitimate reason.

Whether a reason is "legitimate" or not is usually decided by a neutral arbitrator, who is bound by well-established principles of labor relations. For instance, it is an established precept of labor relations that workers may not be fired for "just cause" because of simple time and attendance infractions unless they receive progressive discipline. This means that if you're late once for work, you can't be fired for "just cause." First you have to be warned that continuation of your attendance problems will ultimately result in termination.

Under "just cause," when a disciplinary decision is challenged, the employer has the burden to prove that the discipline was justified. This fact alone serves as a guard against bad behavior by bosses, since no employer wants their disciplinary decisions overturned by an arbitrator.

In most labor contracts, the "just cause" standard is usually applied to disciplinary infractions. However, where basic competency or job skills are at issue and have resulted in termination, the application of "just cause" becomes more problematic, since the determination of competency usually falls within management prerogative.

While not impossible, these cases are often extremely difficult for the worker to win. Unless management's claims are entirely bogus, an arbitrator will be inclined to side with management, since management is often in the best position to judge a worker's skill set. An arbitrator is not wont to second-guess that decision.

Now let's turn to musicians. Let's say that a music director wants to discipline or fire a musician for musical incompetency. As we've said, most arbitrators will go along with an employer's decision about whether or not a worker is competent or not. Therefore, to protect musicians, most of our union contracts – at least in the classical realm – contain a peer review process. A musician who is subject to discipline or termination for artistic reasons may invoke peer review. A committee of fellow musicians is then selected to judge the musical competency of a musician. This makes a great deal of sense, since the success of an orchestral performance requires that each and every member perform at an expected level. If one player is not at that level, the performance of the entire group could suffer. Thus, the collective whole has good reason to ensure that the performance standards are maintained by each member.

In "pure" peer review, the members of the orchestra – not the music director – have the final say over whether a musician should be fired or not. In other kinds of peer review, the musicians have a voice in the process, but the music director still has final say.

However, even peer review is not infallible. A recent peer review hearing I was involved in with the Princeton Symphony comes to mind. In that case, it became evident to me that the musicians of the peer review committee may

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have been biased against the claimant because he invoked peer review rather than agree to resign, as management desired. The musician was, in fact, lambasted by management for having chosen peer review.

During the hearing, it seemed as though the result was pre-determined and that the hearing was just an annoyance. Not surprisingly, the peer review committee unanimously upheld the music director's decision not to renew this musician. We felt that management improperly influenced the peer review process.

The musician and I challenged this decision before the National Labor Relations Board. While the NLRB found that management's conduct arguably violated the National Labor Relations Act, since it was a singular occurrence they would not issue a complaint. Further, since there was no tangible proof that management was the catalyst behind the peer review committee's decision, their actions could not be challenged under the NLRA.

The results in the Princeton matter should be instructive to musicians who negotiate a peer review process into their contracts. First, the names of the selected members of a peer review committee should be kept anonymous until the process is actually invoked, so that neutrality can be preserved. Their identity should not be disclosed to management or the claimant until the actual date of the hearing. Second, members of the peer review committee should be required to be physically present during the peer review hearing. (The Princeton matter was made extremely cumbersome due to the fact that not all members of the peer review committee were physically present during the hearing.) Lastly, all members of the orchestra should receive instruction on the importance of peer review and the vital role they serve as potential peer review committee members. Peer review committees literally have an individual's career in their hands.

The AFM has some useful resources to assist in providing musicians with instruction and information on the peer review process. I highly recommend that all members check it out. Go to **www.afm.org/member/page/id/10525**. (Follow the directions to log in and register if necessary.)

CONTRACTOR'S CHECKLIST

The following is a list of tasks that a contractor is required to complete for all electronic media sessions. If a contractor is not required on the session by the terms of the specific collective bargaining agreement, the leader is responsible for completing the checklist.

BEFORE THE SESSION:

- **Obtain all pertinent information from the producer regarding the project.**
- **Confirm the signatory status of the producer.**
- **Report the session to the local in whose jurisdiction the work is to be performed.**
- **Confirm the wage scales and benefits with the local or AFM. You should be able to put together a budget for the project at this point.**
- **Put out the call to the musicians and include all pertinent information regarding the session.**

DURING THE SESSION:

- **Be present at all sessions at all reasonable times.**
- **Keep track of how long each musician is employed on each session. Keep track of each cue and/or song title on which each musician performs, as well as doubles and overdubs.**
- **Collect W-4's, I-9's, and other necessary payroll documents from the musicians, as well as all information required to complete the appropriate B Report Form.**

AFTER THE SESSION:

- **Fill out the appropriate B Report Form.**
- **Immediately submit the completed B Report Form, along with all invoices (music preparation, cartage, etc.) and payroll documents to the producer for payment.**
- **Immediately submit a copy of the completed B Report Form to the local in whose jurisdiction the services took place.**

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