

**Daniel #2**

**ARBITRATION APPEAL PROCEDURE OF MICHIGAN**

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

and

EMPLOYEE

Gr. Termination 7/29/96

ARBITRATOR: WILLIAM P. DANIEL

**FACTS**

The claimant worked as a Switch Supervisor at the City A Distribution Center involved in the moving of trailers from one dock door to another or moving loaded trailers from the dock area for transportation to various stores. The claimant was first employed March 21, 1990 and during the period of his employment, he had two prior disciplinary actions taken against him. The claimant became the switching supervisor in the fall of 1994 and directed approximately 10 other employees.

The first incident of prior discipline occurred on March 20, 1995 and cited the claimant for violation of the Honesty Policy. He had been asked by his supervisor, Person 1, to talk to an associate about an attendance problem. He sent a note to Person 1 indicating that he had done so and when asked again about it, said it was taken care of, when in fact, it was not done for several days after that. The interview report stated: "[A]ny future violations of the Honesty Policy will result in further discipline, up to and including termination." The second disciplinary action occurred December 18, 1995. In that case, Person 1 had instructed the claimant of a change in his work schedule. The claimant did not report on either of the newly scheduled days and when

asked by Person 1 about it, he claimed that Person 1 had not specifically instructed him as to the second day. He claimed that another supervisor had given him permission but an investigation revealed that that was not so. The Employer regarded this as another breach of the honesty policy about which he had previously been warned and he was cautioned again that:

". . . [I]f in the future you do not work your scheduled shifts, or do not contact [your supervisors) regarding any changes, you will be subject to discipline up to an including termination."

Because these two previous incidents of discipline relied upon by the employer in this case had not previously been subject to an arbitration appeal procedure, the claimant was given an opportunity to explain any extenuating or mitigating circumstances which might affect the weight to be given to that record.

In the instant case, the claimant was scheduled to work July 22 and July 23, 1996 and in addition to his normal supervisory duties on those days, he was also involved in a process called CAP. The Correction Action Process is a procedure instituted by the personnel department for managers who are having some problems. It was designed to help the person to improve their efficiency through a series of regular weekly meetings and the claimant had just started a week before. On the Thursday before that weekend and after the schedule was posted, the claimant sent a computer note to Person 1, which he received Friday, morning asking for time off on those two days. Person 1 consulted with other Employer representatives Person 2 and Person 3 and subsequently called the claimant back on Friday afternoon. The Employer was most reluctant to give him the time off due to the very late notice and the fact that he would miss the scheduled CAP meeting, Person 1 told him that the reason would have to be very important. The claimant told Person 1 that a close high school friend with whom he had been planning the high school reunion had been killed in an accident and he felt that he was obliged to go to the funeral in State

A. Reluctantly, Person 1 granted the time off. The claimant received compensation for these two days of leave.

Person 2 was the unit director and the superior of Person 1. He related that the claimant had been developing attendance problems that culminated in a meeting on June 26, 1996. Of particular concern was the case of a recent absence on June 13, wherein Person 1 had been told that he was ill and had a serious medical procedure scheduled the next day. Upon his return when Person 1 asked how it went, he was informed that it had not taken place. He then expressed his displeasure over the claimant's failure to report for work on that day. Person 2 testified that part of his concern over his absenteeism was that claimant was working a second job off hours driving a tour bus causing a suspicion that perhaps that employment was the cause of some absences. At that time, the claimant was told that because of his record, he would have to give the Employer much more detail to get any time off particularly any late request after the Thursday posting.

Person 2 had been informed by Person 1 about the claimant's urgent need for time off to attend the funeral of his best friend in State A. Because of his suspicions, Person 2 directed that contact be made with the tour bus Employer and it was learned that the claimant drove a tour bus leaving on Monday July 22nd to Place A, State B, returning the next day. Having this information, Person 2 met the claimant on July 25 as he came into work and questioned him about the death of his friend and the funeral. The claimant confirmed that he had gone to the funeral. Thereupon, Person 2 called a meeting with the claimant and Person 1. He reviewed the fact that claimant's commitment to the job was unsatisfactory and that during his absence he had missed an important CAP meeting. The claimant insisted that he had driven to State A for the funeral but hesitated to explain where it had taken place. Person 2 challenged him as to his

truthfulness and there was a long pause. At that point, Person 2 confronted him about his driving the tour bus on Monday and Tuesday and asked for an explanation. He reviewed for the claimant the past warnings that had been given him regarding his absenteeism and schedule obligation. Person 2 continued to ask questions but got no explanation or excuse. Thereupon, the claimant was suspended pending further investigation. As he was leaving, the claimant complained that he did not understand because if he had personal days coming, he should be able to use them without going through "the third degree".

Person 2 consulted with OMP Relations Specialist, Person 3, who reviews disciplinary cases and sees that Employer policies are consistently enforced. It was concluded between Person 3, Person 1, and Person 2 that the claimant had lied to Person 1 initially and in the meeting of July 25 and that that constituted a violation of the honesty policy. Furthermore, it was recommended that in light of his previous honesty problems, the claimant should be terminated.

On July 29 a meeting was held between Person 2, Person 1 and the claimant and he was informed that he was being terminated because of violation of the honesty policy and his overall poor work record. It was Person 2' opinion that even without a poor work record, the circumstances justified termination for dishonesty.

Person 3 testified as to his authority in regard to reviewing disciplinary discharge cases and enforcing Employer policies. He noted that the claimant had been put into the CAP program because of reports not getting done in a timely fashion and a communication gap with his supervisor. Though it was not considered disciplinary action, it was of great significance for his future employment as far as the employer was concerned and it had just commenced July 16, 1996. Person 3 attended the initial meeting so as to get it well under way. One of the concerns the claimant expressed privately to Person 3 that day was restrictions on the use of personal days.

He felt that it was not fair that he had to disclose his whereabouts and why he was taking such time off. Person 3 testified that he explained that personal days requested in advance and pre-approved would be a private matter but that after the schedule had been posted, the Employer would always require a good reason to be given. Despite his explanation, Person 3 was of the opinion that the claimant still did not agree with the Employer having any right to regulate or to demand explanations for absences of that nature.

Person 3 was consulted by Person 1 in regard to the requested time off for the funeral and reluctantly told Person 1 that if it was an emergency with a funeral that he should tell the claimant that it was up to him to make that final decision. Subsequently, he received a phone call from Person 2 on July 22 informing him of the fact that the claimant had not gone to the funeral but rather was driving a tour bus on the days in question. He recommended that Person 2 immediately confront the claimant and confirm his alleged excuse. Person 2 reported that the claimant maintained throughout the interview that he had gone to the funeral until he was confronted with the facts. Having received this information, Person 3 recommended that the claimant be terminated and reviewed it with the general manager of the distribution center.

In Person 3's opinion, the substance of the violation was the request of time off under false pretenses which he would not have gotten otherwise. This incident further destroyed the claimant's credibility and was a clear violation of the honesty policy. A review of his prior work record indicated the other occasions when the claimant had been dishonest and had actually been warned that any repeat could subject him to disciplinary discharge.

The claimant testified as to the July 16 meeting when the CAP program was applied to him because of his unsatisfactory work performance. He did not recall at all talking about personal days or time off during that meeting. He testified that when accused by the Employer of

not going to the funeral, he initially denied it because he felt the employer had no right to get into his personal life. He was never asked why the change of plans had come about. He was never told that if he did not go to the funeral he had to report back on those two days or had to let the employer know the situation. It simply happened that he had had a present intention to go to the funeral but then it became impossible and he took advantage of the days off he had already been granted. He felt that the honesty policy does not say you have to be truthful about leave days or that you can be terminated for it; rather it is involved with things such as theft or unauthorized possession of property.

On cross-examination, the claimant acknowledged that he had been working for the tour bus Employer for some time and that they knew his work schedule and would assign him on days that he was off. He did not find out about the opportunity to drive the tour bus to Place A until Sunday, July 21. He admitted that as a part-time employee he had the right to reject any such offer. He again asserted that at the time he requested the days off, he intended to go to the funeral and that it was very important. He acknowledged that he was convinced that if he had simply asked Person 1 for time off to drive for the bus company, it would not have been granted because of his prior problems. On redirect, the claimant expressed the opinion that if the Employer had had a problem, then the time to say no was when he requested the days off. Once the days were granted, even though his plans changed, he felt that the days were his to do with as he pleased.

Upon being recalled to the stand by the claimant, Person 1 was asked to point out the portions of the honesty policy that he felt pertained to the charges against the claimant. He noted the phrase "Likewise, we expect you to be totally honest at all times". Further, Person 1 noted the specification that "failure to do this will result in termination of employment". Subsequently, on

further examination, Person 3 explained how the honesty policy is administered. He confirmed that the policy requires total honesty at all times from all employees. Person 3 conceded on cross-examination that the policy did not specifically indicate that discharge could be the penalty for deceit as opposed to theft or unauthorized possession of property; he did not feel it was necessary.

The claimant checked on the termination appeal form in answer to the question "Do you believe you were discriminated against?" the affirmative. His explanation to the further inquiry as to the basis for such claim "e.g. race, color, national origin, sex, age, religion, marital status, handicap, height, weight, veteran status, or other" - that he felt "my whereabouts were looked into during my personal time off which I feel is a total violation of my privacy". Prior to, during, and at the conclusion of the hearing, the claimant made no assertion that he had been discriminated against for any of the above listed reasons.

### **TERMINATION APPEAL PROCEDURE**

#### **A. Purpose and Scope**

This procedure has been established to provide an exclusive, final and binding method for the Employer and any eligible associate to resolve all claims, controversies, disputes or complaints arising out of or relating to the associate's termination from employment, including any claims or complaints based on federal, state or local law. In the event an associate who is eligible to use this procedure has a complaint about his or her termination from employment, it will be resolved in accordance with this procedure.

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#### **A. Arbitrator's Authority**

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate's termination from employment. The arbitrator shall have the authority to determine whether the termination was lawful under applicable

federal, state and local law and to determine whether the Employer had just cause for termination.

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or which was raised at the arbitration hearing and which was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have the authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business.

If the arbitrator finds that the associate violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action.

**A. Relief**

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the award the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment compensation payments, and any amount attributed to the associate's failure to mitigate the damages.

If the arbitrator orders reinstatement, the Employer shall have the option, within fourteen (14) days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

**N. Arbitrator's Award**

The arbitrator shall submit to the parties a written award signed by the arbitrator. The award shall specify the relief awarded, if any, and the elements and basis for

any monetary award. The award shall be accompanied by a written opinion signed by the arbitrator which shall include findings of fact and, where appropriate, conclusions of law.

The arbitrator's award shall be final and binding and a judgment may be entered on the award by any circuit court or other court of competent jurisdiction.

## **POSITIONS OF THE PARTIES**

**Employer:** The Honesty Policy requires that employees be totally honest at all times.

The claimant told his immediate supervisor that he had to have time off to go to a friend's funeral in State A. In fact, he did not do so but rather worked at a second job driving a tour bus. It is the contention of the claimant that he had intended to go to the funeral but subsequently changed his mind and instead used the days for the other purpose. That is a matter of credibility which the arbitrator will have to resolve.

However, it must be kept in mind that he lied about the facts when he was confronted both personally by Person 2 and in the meeting that subsequently followed. The claimant was well aware of the honesty policy having been warned in that regard previously and as recently as June 26. The Employer conducted a reasonable and fair investigation and concluded that the claimant was in violation of the honesty policy. That policy certainly establishes that disciplinary action will be taken in the event of violation and it was not necessary to go into specific detail in that regard.

The fact that the claimant in this case managed to avoid a very important CAP meeting and has a past record of attendance and honesty problems are all factors which were properly taken into consideration by the employer. The Employer's policy regarding days off is fair and there is no invasion of privacy whatsoever where employees give sufficient notice before the schedule is posted. In this case, as in any case, once the schedule has been posted, the employer

has the right to know the specific reasons for absence because such interferes substantially with the efficient operation.

There is no evidence of disparate or discriminatory treatment of the claimant and for the reasons cited above the arbitrator should deny this grievance.

**Claimant:** The Honesty Policy really does not indicate that if you are dishonest you will be terminated for it. It does state that specific items such as theft or knowledge of stealing can involve serious obligations that might result in termination but that was not the situation in this case at all. The Employer is wrong when it claims that I deliberately lied to get time off.

The fact is that the time off was granted for a funeral which, at that time, I intended to attend. There was no false reason given to get the leave. When circumstances changed and the days off were still as scheduled, there was no reason why I could not use that time for any other purpose. It was a matter of personal days off and I was not obliged to get any further permission from the Employer. At no time did any Employer official indicate that if plans changed, it was necessary to report for work or that failure to do so could result in disciplinary action.

Because this time off was personal, there was no obligation on my part to answer any questions asked by the Employer and that is the reason false information was given to the interrogation by the Employer. This was not lying but simply an assertion of my right not to have to divulge personal information under these circumstances.

Based upon all of the evidence in this case, the arbitrator should find that there was not just cause for disciplinary action and direct that I be reinstated to my job with full back pay and full compensation for any lost benefits.

## **ISSUE**

Was there just cause for the termination of the claimant?

## **DISCUSSION**

The Employer has an absolute right to make fair and reasonable policies and rules governing the conduct of employees. Even without a specific policy in regard to honesty, that is a character trait which any employer has the right to expect regardless of whether it is expressed in terms of a written rule or not. Furthermore, all employees know that they are expected to be honest in the performance of their work and in their relationship with their supervisors. The policy in this case is quite specific as to honesty at all times and not just in regard to certain criminal-like activities. The fact that it is not specifically set forth that disciplinary action will be taken against an employee who is dishonest in the form of false reports or lying to supervisors does not nullify the policy or deny to the employer the right to take appropriate action for a violation.

This claimant who occupied a position of trust as a supervisor was well aware of this policy. He previously had been reprimanded for violating it and had, on several occasions, been counseled. He had been warned that future violations could result in discharge and so his assertion of some uncertainty in this regard is unconvincing. In particular, he had been warned about days off in violation of the posted schedule and knew that the Employer took that very seriously. His total employment record was not developing very well and as recently as June 1996, he had been put into the CAP program in hopes of improving his performance. It is found that informally at that meeting of June 26, he had been told by Person 3 how important the days

off request were and that the Employer would require very specific detail where such occurred under emergency or short term notice.

It is the Employer's contention that the claimant probably knew that he was not going to a funeral in State A on the days in question but made that representation so that he could get time off that otherwise would not be granted. He did this for the purpose of earning compensation at a second job by driving a tour bus. The claimant claims that, in fact, he was intending to go the funeral but that after having gotten the days "things changed" and he decided rather not to go and then learned of the opportunity to work. Whether or not it was his intention from the very beginning to give false reasons for the leave will have to be determined on the basis of an overall credibility examination. Factors that weigh somewhat against him in this regard are that he offered no explanation of how "things changed" or why he would not go to the funeral of his very best friend with whom he was in regular contact. In fact, he offered no proof that there was actually a funeral on that day. Such information is readily available through the funeral director who was involved in the ceremonies. Furthermore, realizing how reluctant the employer was for him to be absent on those days, he did not undertake to communicate to the employer that he was free in the event the employer wished to rearrange the schedule or hold the CAP meeting. The burden falls on the claimant to prove any affirmative defenses which he raises and his presentation is deficient.

Essentially, the claimant's defense is that personal days are a private matter and that the employer has no reason for inquiring as to what an individual is going to be doing during that time. Indeed, Person 3 agreed that generally speaking, the Employer would grant personal days upon adequate notification and would not be concerned with how they were being used. However, all employees, including the claimant particularly, were aware of the fact that once the

schedule was posted, any changes were a considerable inconvenience and problem for the Employer and that in such cases, very good reasons would have to be provided. The claimant's opinion is to the contrary - that once the days are given, regardless of the reason, then they become purely a personal matter and the employer has no right to complain. He would make no exception even for short notice situations as in this case. The claimant extends that argument to explain why when asked on his day of return about the funeral he lied to his supervisor and persisted in that denial throughout the meeting which ensued. It is his opinion that since the employer had no right to know what he was doing or to complain about it, he was under no obligation to answer questions truthfully.

This attitude on the part of the claimant tends to also affect his credibility. A person with a belief that personal days are a matter of absolute right and the Employer is not entitled to full disclosure would not be above giving a false reason to start with. In all likelihood he never had a funeral to go to but simply fabricated that excuse so that he could accept work driving the bus. He did that because he knew that on a short notice, after the schedule was posted, the employer would never give him the time off if it knew that was real reason.

There is no evidence in the record which in any respect raises a question of disparate or discriminatory treatment for any reason whatsoever. It is found, then, that this case must be decided upon the issue of whether there was just cause for termination resulting from violation of the honesty policy.

## **AWARD**

The claim is denied. The policy sufficiently details the expectation of the employer that all employees will act honestly in all respects of their employment. The claimant was adequately informed of this policy, the Employer's expectations and his disciplinary jeopardy for any violation. He was also well informed of the Employer's requirements as to request for personal days on short term notice. It is found that he obtained the leave of absence by falsifying the reasons and thereafter, when questioned about it, lied. His actions constitute dishonesty and he was subject to disciplinary action. The penalty of discharge was appropriate.

William P. Daniel

Dated: March 18, 1997