

Daniel #3

IN THE MATTER OF THE ARBITRATION BETWEEN:

Employer, Inc.

and

Employee

APR .15 2002

Arbitrator: William P. Daniel

This matter is submitted to the arbitrator under the terms of the Termination Appeal Procedure which establishes the method by which employees who are terminated may elect to have such disciplinary action appealed to an impartial arbitrator to determine the validity of such action.

FACTS

At its warehousing facility, there is a receiving dock 93 where the grievant worked as an auditor or receiving clerk. He was under the immediate supervision of Person 1, the Receiving Supervisor and Wade Person 2, the Cross Stock Manager and superior of Person 1.

Near the loading dock, there is a break room where there are a number of vending machines situated which are owned, operated, and serviced by Canteen Services. In addition to the machines, there is a coin changer which was, on the day in question, set up to give change for a one dollar bill - 4 quarters, or for five dollar bill - 4 one dollar coins plus 4 quarters. On July 25 it was reported to Person 2 by an hourly employee that the machine was malfunctioning and that employees were putting in five dollar bills and getting more than five dollars in change. He reported this to Canteen Services which turned the machine off until it could be repaired. He also

asked Person 1 to investigate the report that some employees were even borrowing five dollar bills so as to run them through the changer and get extra money.

Person 1 interviewed an employee, Person 3, who had reported the problem and who was most reluctant to talk about the subject. Finally, when confronted with his obligation under the Employer's published honesty policy, he said that some one was going around asking for five dollar bills because the change machine was giving back more than \$5.00 in change. After further prodding over the honesty policy, Person 3 identified the grievant as the person who was asking for five dollar bills and, shortly after getting one from him, repaid repaired him with five dollars in quarters.

The next day, Person 1 interviewed the grievant who acknowledged that he was aware of the honesty and theft policies of the Employer. When confronted with the information about the machine malfunctioning, the grievant acknowledged he had heard other employees talking about it the prior day. At first, the grievant denied ever getting more money back in change than what he was supposed to but finally admitted that he had asked others for \$5.00 bills. He contended initially that this was in order to buy lunch and that he had obtained two five dollar bills in this fashion. After borrowing money the prior day, he also paid it back that same day. He finally admitted that having borrowed the two five dollar bills, he got change out of the machine and then paid it back, keeping \$8.00 for himself which was the overpayment. According to Person 1, the grievant said that he had gone out trying to find another five dollar bill, but the machine was empty when he returned. The grievant told Person 1 that it was not his fault the machine was giving back too much money - "it was free money, better than a casino, you're a winner every time". The grievant complained at the time that machines were always ripping employees off and

that they had to go through the process of filling out an envelope to get refunds which was awkward and inconvenient.

Person 1 investigation took him to interviews with Person 4, Person 5, and Person 6 who were also rumored to have been involved. Person 1 suspended the grievant as well as the other three persons pending further action. His investigation and recommendations of disciplinary action were reviewed by OMP relations in the Human Resources Department and Person 2 was advised to terminate Person 4, Person 5, and the grievant but not Person 6 since there was insufficient evidence in his case.

Person 2, the Cross-Deck Manager for the General Merchandise Building, testified that it came to his attention from an employee that the machine was malfunctioning and that some persons may have received more money in change than they should have. He directed Person 1 to investigate and interview people who might be involved. In talking with the Canteen Service employee, he was told that the loss was approximately \$1,000. When Person 1 provided him with the results of the investigation, he found it quite clear that the grievant had violated the theft policy because he had taken money that did not belong to him from a vendor.

On August 3, Person 2 conducted a termination meeting with the grievant, who had previously been suspended, and Person 1. He told the grievant that he was being terminated because he had violated the theft and honesty policy. The grievant's response was that he did not understand how he could be accountable since "the changer's sole job in life was to dispense money" and he didn't feel he could be held to blame because it gave him an incorrect amount money, no matter how many times it did that.

Person 2 related that over his term as a manager, there had been a number of employees found to have committed theft and that, in every case, the discipline was termination. As to the

other employees involved in this case, Person 4 admitted that she had taken money that did not belong to her as did Person 5 and both of them were terminated. As to Person 6, there was not sufficient evidence found that he actually had received money, but he was given a suspension because of dishonesty in the process of the investigation - refusing to cooperate and giving false information.

The grievant testified that he was hired in 1997 and transferred to the DC 93 dock area about a year and a half prior to this incident. He conceded that he was aware of the honesty and theft policies which had been published by the employer but did not believe they applied to this case. He testified that he viewed it as the same as receiving from a store or restaurant something that you had ordered but only better or more of it. He did not perceive the difference between that situation and where a person was actively involved in obtaining more than what they were entitled to.

He admitted borrowing money from fellow employees once he learned that the machine was malfunctioning and that through this means, he was able to make a "profit" of \$8.00 on the two transactions. He testified:

I put a \$5.00 bill in. It says, put your bill in here. That's what I did. Whether or not I knew it was giving me extra money or not, I didn't feel it was relevant and that's how I acted and when confronted with it, I admitted what I did, which is in accordance with the honesty policy, and its just ridiculous.

On cross-examination, the grievant was of the opinion that his actions did not constitute theft because he did not actually break into the machine or use counterfeit money. He admitted that he knew ahead of time that if he put in a \$5.00 bill, he would get nine dollars back. He did not believe this was the same thing as actually stealing property belonging to the Employer which he realized would result in his automatic termination. He cited other instances that he felt

were unfair when he did not get change back to which he was entitled or the machine malfunctioned and also pointed that, from time to time, the machine might discharge two bags of chips instead of the one that was paid for, which he did not feel was, in any way, a theft.

The appeal filed by the grievant contended that he was improperly charged with theft when such did not occur and sought his reinstatement with a monetary award of back pay.

APPEAL PROCEDURES AND POLICIES

Termination Appeal Procedure

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Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the team member'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 team member violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the team member was terminated for that violation, the team member's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some letters disciplinary action.

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Policies

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Honesty

Just as you expect the Employer to be honest with you at all times, likewise we expect you to be totally honest at all times. This total commitment is a must.

Based on this, we require you to be totally honest with customers, the Employer, fellow team members, vendors, suppliers, etc. Team members involved in theft or unauthorized possession or property from any of these sources will be terminated.

Dishonest team members hurt everyone. They can jeopardize everyone's job security through their actions. If you should become aware of anyone who is dishonest, it is your responsibility to notify a first assistant or loss prevention. Failure to do this will result in termination of employment.

Theft

Associates/Team members involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow associates/team members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service.

POSITIONS OF THE PARITES

Employer: There is ample evidence that the grievant knowingly put \$5.00 bills in the machine with the intention of receiving more change than he was entitled to and he accomplished that. That is clearly contrary to the Employer's published policies on theft and dishonesty and the grievant acknowledges that he knew of such rules.

Other employees who were involved and proven guilty of the same offense were treated in the same fashion. Discharge has always been the penalty for proven theft at the Employer. For these reasons, the grievant's appeal should be denied.

Grievant: There was no theft from the machine. It simply malfunctioned and in giving more money back than it was supposed to, it was the machine's fault and not that of the employees. The situation is very much the same as when having paid for something, the seller gives more than what is expected; in such cases, a purchaser should not be obliged to return the

extra. All that happened here is that the employee, without any intent of stealing or committing theft, accepted what the machine gave him and this should not be constituted as a violation of any policy or rule.

For these reasons, the grievant should be reinstated to employment and made whole for any loss he has incurred.

ISSUE

Was the grievant guilty of theft and dishonesty as charged and, if so, was discharge the appropriate penalty?

DISCUSSION

The arbitrator is a creature of the Termination Appeal Procedure and has only that authority which is stated. Where the arbitrator finds that the employer has proven that the grievant violated the particular rule and that rule, as established by the employer provides for discipline in the form of termination, then the arbitrator is not free to modify the penalty. This is so even though he may find circumstances which would persuade him to do so otherwise.

It is quite clear from the evidence that the employer has two policies of relevance here. One involves honesty and the other, theft. The specific language of the theft policy is paraphrased in the honesty policy and so they are essentially inseparable. This factual situation presents a somewhat disturbing picture of the state of the moral compass and conscience of people in these times. Where years ago, a person's reputation for honesty was cherished and they were universally admired and emulated that has been changing. George Washington and Abraham Lincoln were held up as role models in that respect and the maxim "finders keepers, losers weepers" might be chanted by children in taunt but seldom subscribed to by adults. There, then, was a time when being honest was quite in fashion as a way of life.

Gradually, almost imperceptibly, the attitude has changed. Today, many people, particularly those in the grievant's generation, subscribed to that old maxim and see nothing wrong with keeping what fortune provides them even though it may belong to someone else. In this case, quite clearly, the grievant learned that the change machine was malfunctioning and that if a person put a \$5.00 bill in there, they would get back \$9.00 or \$4.00 "profit". He did this twice, borrowing money from other employees and clearly would have continued to do it as long as the machine dispensed money if he could have gotten more \$5.00 bills.

When interviewed, at first he was evasive and denied what he had done but later he acknowledged his scheme - "not my fault the machine wasn't working right. Great payout, better than the casinos; you are a guaranteed winner". The coolness with which he totally ignores that the money belonged to someone else is very troubling. This is true also of his attempt to rationalize by citing that the machine "rips us off all the time and you have to fill out an envelope to get your money back". Apparently, he regarded this as some justification for getting back at the machine's owner. He recognized that Canteen Service would pay him back upon request but found it so inconvenient or burdensome that he frequently did nothing in that respect and yet, at this point, came to believe that the machine owed him something.

In his testimony, the grievant compounded this attempt to rationalize his misconduct by explaining that he viewed the machine malfunction as similar to purchasing something at a store or restaurant and getting more than what you had ordered or would pay for - such as a second scoop of ice cream when only one was ordered. He seemed unable to comprehend the questions of counsel for the Employer as to the difference between passively accepting more than what was ordered in a restaurant and an active scheme to obtain financial benefit through the malfunction of a machine. Perhaps, the grievant just simply was not able to comprehend that the

money did not belong to the machine but to the Employer which had stocked it with bills and product. He concluded his directed examination by saying "I felt justified in doing it". He explained further on cross-examination that it was not a theft because he did not break into the machine or use counterfeit money.

While denying that his actions which took money from a vendor were improper, he acknowledged that if he had stolen property of Employer, he would be fired and that it was his understanding of the theft policy "it was very clear, everybody knows that if you steal something, you are going to get fired". But in the next breath, he conceded that he thought he was entitled to keep the money that the machine "gave him". He cited another example about banks and A.T.M. machines "if they load the machine wrong, if they put the \$20s in the \$5.00 slot and the \$5s in the \$20 slot, they do not prosecute, it's not theft. It is who ever loaded the machine wrong, it's a mistake".

There is more to be noted from his testimony; "I felt that I had every right to that money, and if I would thought that I was going to be considered stealing, I obviously would not have admitted it because there's people that didn't admit it ... and they kept their job". It seems that even at the time of hearing the grievant was not sorry that he had taken the money but rather sorry that he had not lied about it and avoided discipline - his moral compass is simply out of whack.

Again, what is so troubling about this is that there is every reason to believe that the grievant speaks for a large percentage of his contemporaries. Regardless of how people like the grievant rationalize and view matters such as this and the real meaning of honesty and theft, the employer is not obliged to adjust the workplace rules to accommodate them and has every right to insist upon compliance with standards of conduct which are universally accepted by mature,

moral people. Even though this is a minimal circumstance purportedly involving \$8.00 of "profit" for the grievant, it must be noted that Canteen reported to the employer that almost \$1,000 had been missing. That means that there are a large number of people still working who took advantage of the situation with no regard for the morality of their conduct. This was not a situation of finding money on the floor - it was an active scheme of the grievant and others to steal money.

Two other employees were terminated on the basis of convincing evidence which the employer developed through its investigation. Another one was retained in his employment because the evidence did not prove his guilt to the level of just cause. The employer's investigation was fair and reasonable as were the interviews which it conducted and there was no lack of due process granted to the individuals involved, including the grievant.

His actions were calculated and intentional and he shows no remorse at this point for any misjudgment. In fact, he continues to assert that he did nothing wrong and, essentially, that it is the fault of the machine.

The grievant is a likeable young man and surprisingly articulate as to his attitude in matters such as this; he simply sees no blame on his part. Unless he is somehow able to educate himself or get back on track, this attitude will likely cause him further problems in the future.

AWARD

The appeal is denied. The grievant was clearly guilty of violation of the promulgated and well known rules regarding honesty and theft. He stole money from a vendor, contrary to the rule and, therefore, was subject to the penalty provided in that policy. His termination, then, was for just cause.

William P. Daniel, Arbitrator