

Fullmer #2

IN THE MATTER OF ARBITRATION

Between

EMPLOYER,

-and-

EMPLOYEE

OPINION AND AWARD

Employee Discharge

No Administering Agency

This case¹ concerns the discharge of the Grievant, Employee, on September 12, 2001 for "violation of the personal purchases policy, violation of the theft policy and violation of the honesty policy."

I. FACTS

Background Facts

The Employer employs some 80,000 employees in its operations in various states. These involve, variously, union represented bargaining unit employees; "team leaders" who apparently

¹ Employer, Inc.(hereafter referred to as "the Employer") and Employee (hereafter referred to as "the Grievant"), are covered by a series of policies and procedures issued by the Employer. One of these, the Termination Appeal Procedure (Employer Ex. 1) provides in for settlement of some disputes through a grievance and arbitration procedure. A covered dispute has arisen between the parties concerning the discharge of the Grievant.

The Termination Appeal Form (Employer Ex. 2) concerning this matter was dated October 1, 2001. It was submitted to arbitration before the arbitrator under the specified procedures. A hearing was held on April 25, 2002 at the Holiday Inn in Fort Mitchell, STATE A. Both advocates made opening and closing statements and presented and cross-examined witnesses. A transcript was taken. Post hearing briefs were filed by both parties with the latter being received by the arbitrator on or about July 16, 2002. No jurisdictional issues were raised by the parties.

hold supervisory authority under the Act and management employees who in turn direct the activities of the team leaders. The applicable policies cited below apply to team leaders as well as bargaining unit employees.

The Grievant is one of these 80,000 employees. She was hired in October, 1999 at the Employer's Store # 186 in City A, STATE A and served as the Systems Team Leader. She of course had Team Members serving under her direction. The Unit Manager at Store #186 at the time of the events in question was one Person 1. The Employer obviously is concerned about inventory and revenue shrinkages and maintains a loss prevention staff at each store. In Store # 186 the Loss Prevention Team Leader was Person 2. The Employer's systems for making purchases are computerized, with some 28 computerized registers sprinkled throughout Store #186. The Grievant was in charge of these computer operations. There is a button on the computers in which a transaction may be "suspended". An example of the use of a "suspension" is when a customer comes to the check out line and finds that he/she has left his/her wallet/purse in the car or when the customer discovers that the merchandise which he/she has purchased cost more than the money he/she has on hand. A transaction which has been suspended may later be re-activated when the customer returns from the parking lot with his wallet.

B. Facts Leading to the Grievance

The events which led to the Grievant's discharge occurred on two days in August, 2001 i.e. August 27 and August 30. On August 27 the Grievant was holding a "meeting" for her staff which included Person 3 and Person 4. (Tr. 132) Such meetings are apparently contemplated by Employer methodology as a method for communicating with staff. Under the reign of Unit Manager Person 1, provision is made for offering meals for the attendees, at least with previous approval. On the occasion in question, the Grievant did not have previous approval.

Nevertheless, the meeting was convened and the meals ordered at the "Food Court" for the attendees, including the Grievant. The total was \$11.55 before tax and \$12.12 after tax. The Grievant did not have enough money to pay for the meals and she asked the cashier to "suspend" the transaction. This was done. The meals taken to the tables and consumed and the meeting held. In the aftermath, the Grievant went to the "cash" desk and obtained \$12.12 as a "pay out". (Employer Ex. 6). This was ostensibly to enable her to purchase the meals for the meeting. As perceived by the Employer, the Grievant did not thereafter use the \$12.12 to retire her debt at the register in the Food Court or at any other register in Store # 186. The \$12.12 was thus left "unaccounted for", presumably in the Grievant's purse.

A few days later, on August 30, the Grievant was involved in quarterbacking the Employer's participation in the local fair. One of her team members, Person 3, was particularly helpful in this respect. When they returned to Store #186 in the early afternoon, Person 3 complained of being hungry. The Grievant indicated that she, the Grievant, would treat for lunch. The two went to the Food Court and made their purchases. The purchases totaled \$7.98 before tax and \$8.46 after tax. At this time the Grievant discovered, according to her version of the events that the "Gift Card" with which she expected to pay for the meals was in her gray smock which in turn was in her truck in the parking lot. The Grievant implored the cashier, Person 5, to "suspend" the transaction. The cashier claimed that she did not know how to do so. The Grievant then took over the console and suspended the transaction herself, either under her own initiative or with coaching from Person 3.² In the days following the Grievant did not repay the \$8.46 to cover the suspended transaction.

Computerized records are made of suspended transactions. Eventually the records of the

² An aspect in dispute.

two suspended transactions described above came to the attention of Loss Prevention Team Leader Person 2. She consulted with Store Manager Person 1 and was told to find out if the amounts had been re-paid. Ms. Person 2 ascertained, that they had not been paid. The Grievant was called in for the appropriate interviews and provided, at least in the Employer's view, no satisfactory explanation for the events in question. The Grievant accordingly on September 12, 2001 was discharged for "violation of the personal purchases policy, violation of the theft policy and violation of the honesty policy." The Grievant filed a grievance under the applicable procedures. The grievance is lengthy, but it includes the statement:

"I insisted I'm entitled to a witness as Person 2 is not impartial and has made discriminating remarks to me and in to others 'fat heifer, blonde bitch' ect.... Employer's is concerned that an enterprising, energetic, volunteering employee has stolen \$8.00 worth of food, but then refused to pay me for my time Wednesday Sept 12th, or salary for week ending Sept 8-01 with ample time Friday and Saturday to meet payroll dead lines, mileage on my truck transporting items and organizing Employer community relations promotions. After my termination, Employer asks me to return, on my own time and vehicle expense, items used for the community relations volunteer work performed that weekend!"

(Employer Ex. 2, p. 2)

The matter was subsequently processed through the steps of the grievance procedure to arbitration.

II. POTENTIALLY APPLICABLE HAND BOOK AND POLICY PROVISIONS

Team Member Handbook

Prevent a Loss Program

Business abuse is described as any inappropriate conduct. It includes mistreatment, theft and crime. If you become aware of any abuse, please notify your first assistant or Loss Prevention. If you prefer to remain anonymous, please call 1-800-2415689 with your information. Rewards of up to \$5,000 are paid for information.

NOTICE
TO: ALL TEAM MEMBERS
REGARDING: HONESTY

BASED ON THIS, WE REQUIRE YOU TO BE TOTALLY HONEST WITH GUESTS, THE EMPLOYER, FELLOW TEAM MEMBERS, VENDORS, SUPPLIERS, ETC. TEAM MEMBERS INVOLVED IN THEFT OR

UNAUTHORIZED POSSESSION OF PROPERTY FROM ANY OF THESE SOURCES WILL BE TERMINATED.

NOTICE
TO: ALL TEAM MEMBERS
REGARDING: IN-STORE FOOD
CONSUMPTION/PERSONAL PURCHASES

5. TEAM MEMBERS MAKING PURCHASES MUST PAY FOR THE MERCHANDISE OR PRODUCTS IN TOTAL AT THE TIME THEY RECEIVE THE MERCHANDISE OR PRODUCTS. TEAM MEMBERS MAY NOT EXTEND CREDIT TO ANYONE WITHOUT PRIOR LEADERSHIP APPROVAL.

III. STIPULATED ISSUE

Whether Employee was discharged for just cause?

IV. POSITIONS OF THE PARTIES

The Employer Position

The Employer maintains that it had just cause to discharge the Grievant for the August 27 incident because she violated both the Employer's purchases policy and the honesty policy. The policies are reviewed and the assertion made that the Grievant had knowledge of them. She violated the purchases policy by failing to pay for the meals at the time they were ordered and consumed. This violation standing alone is sufficient to justify discharge.

The same is true of the honesty policy. It is undisputed that the Grievant had the duty to pay back the sums at issue. Three different sets of computer records were submitted to prove that these sums were not paid back. The claim of payment is contradicted by the computer records.

The Grievant's story of an alleged repayment changed dramatically at the arbitration. Her claims of diversity of enforcement failed of proof.

With respect to the incident of August 30, the Grievant violated the Employer's purchases policy. In this incident the Grievant relies solely on the claim of diversity of enforcement. As indicated these claims are specious. Each of these instances is reviewed.

The alleged animosity between the Grievant and Ms. Person 2 did not taint the investigation. The relationship was strained, but this does not change the facts. There was an independent review and this verified the facts found by Ms. Person 2. Indeed most of the facts surrounding each of the incidents are undisputed.

In conclusion, the policies were violated in the incidents as charged. Each incident provided an independent basis for the discharge of the Grievant. The Employer is free to set its own standards of employment as long as they are enforced on a uniform basis. That was done here. The grievance should be denied and the discharge of the Grievant sustained.

The Grievant Position

The Grievant was discharged for theft for events occurring close to Memorial Day holidays. There were distractions during this period. In the August 27th incident, the food was paid for as a "suspended transaction". The Grievant took the receipt to the cash office to complete the payment and instead received cash. The Grievant did the proper thing and took the cash to the check-out counter to complete the suspended transaction. Due to the **hecticity**, the Grievant took the cash and put it on top of the keyboard for the cashier to ring out later. She did not "steal" the money as the Employer claims. If there s comparable negligence it would seem the Employer is the more negligent. The Employer's reliance on the computerized records is

suspect because there are many other explanations than the Grievant's having pocketed the money.

In the second incident, on August 30th, the transaction was also suspended. The Grievant had been working on her own time at a Employer booth recruiting new employees. There were gaps and by the time the Grievant reported to the store, she had been discharged. She never had a chance to make the payment requested by the Employer. The Employer claims she should have paid on a Sunday. But, on that day the Grievant worked 17 hours at the store and the fair and understandably was somewhat frazzled. It is understandable that she would have forgotten to make the payment under the stress of these events.

In the background there was animosity between the Grievant and the investigating person. This explains the harsh action which was taken against the Grievant. The Employer advanced two reasons for the discharge of the Grievant and neither of them bears scrutiny. The Employer has lost a dedicated and capable employee. Because of this heavy burden of "theft" she had not been able to find a new job. She requests that her name be cleared of all theft accusations, that she be paid all back pay, that she recover her out-of-pocket costs for the arbitration and that she recover a sufficient amount to tide her over until she finds a new position.

V. DISCUSSION

A. Introduction

The Employer has a Termination Appeal Procedure which is applicable to Team Leaders such as the Grievant. It specifies the standard as governing review of discharges as the "just cause" standard and the parties have stipulated the issue in the present case in those terms. Within that overall issue, there appear to be a number of sub-issues. These include, first, the content and

reasonability of the Employer's rules in question. Second, the Grievant's knowledge of those rules. Third, the evidence relied upon with respect to a violation of the rules. Fourth and finally, the claims of disparate enforcement relied upon by the Grievant. We turn to these issues in the order stated.

B. The Employer's Rules and Their Reasonability

The Employer has the rules quoted above concerning the loss prevention program, honesty, and in-store food consumption/ personal purchases. As the Employer points out, it is involved in a very large retailing operation, with 80,000 employees. It stands to reason that it must have rules concerning honesty, loss prevention and in-store purchases. Were there not, the merchandise might start streaming out the doors, unpaid for, and the profits might vanish. Aside from the prevention of theft, there must be some rules concerning the mere orderliness of the procedures governing the matters. If the entire matter were simply left to chance, employees loading televisions into their trucks in the parking lot could claim that they were simply engaged in the first step of an in-house purchase. Put succinctly, it seems to the arbitrator that the Employer has the right to promulgate procedures concerning honesty and the procedures governing in-house purchases.

Beyond this, it is not entirely clear that the arbitrator has jurisdiction to review the reasonability of rules promulgated by the Employer. The Employer issues the rules and they go up on the board, so to speak. A free-standing grievance filed by a covered employee claiming that a rule was unreasonable might not be cognizable under the Employer's arbitration procedure. Moreover it is not clear that the Grievant is making such a challenge, i.e. that the rules are unreasonable. To make such a claim would in essence be to urge that dishonesty is permissible

and/or that in-house purchases may be made by whatever procedure an employee thinks is appropriate that day.

For the reasons stated, that arbitrator holds that the rules in question are reasonable or at least that they have not been challenged in this case. We turn to the Grievant's knowledge of the rules involved in this case.

C. The Grievant's Knowledge of the Rules In Question.

The Grievant claimed at the arbitration hearing that in general she did not have knowledge of the Employer Policies and Procedures involved in the present case. According to her testimony she was hired in something of a rush and had the form "Employer Policies and Procedures" shoved in front of her and simply signed it in response to the mandates of the persons hiring her.

Nevertheless, the form in question (Employer Ex. 15) is a fact. The Grievant signed it on October 11, 1999. It indicated that:

"THE EMPLOYER'S WRITTEN POLICIES AND PROCEDURES ARE FOUND IN A NUMBER OF PUBLICATIONS AND DOCUMENTS AND ARE AVAILABLE FOR VIEWING ON-LINE. OTHERS MAY BE UNWRITTEN. YOU WILL BE INFORMED ABOUT THE POLICIES AND PROCEDURES WHICH PERTAIN TO OR AFFECT YOU. IT IS YOUR RESPONSIBILITY TO BE FAMILIAR WITH THOSE POLICIES AND PROCEDURES AND TO FOLLOW THEM.

MANY OF THE EMPLOYER'S POLICIES AND PROCEDURES ARE PUBLISHED IN A MANUAL ENTITLED POLICY AND PROCEDURES. EACH UNIT HAS A COPY OF THIS MANUAL OR THEY CAN BE VIEWED ON-LINE. SOME UNITS ALSO HAVE A NOTICES NOTEBOOK WHICH CONTAINS INFORMATION ABOUT PARTICULAR POLICIES. THESE PUBLICATIONS ARE AVAILABLE FOR REVIEW THROUGH YOUR FIRST ASSISTANT. THE TEAM LEADER HANDBOOK IS A GENERAL REFERENCE FOR INFORMATION ON EMPLOYER HISTORY. THE EMPLOYER'S POLICIES AND PROCEDURES ARE STATED OR SUMMARIZED IN THE HANDBOOK. TALK TO YOUR FIRST ASSISTANT. OTHER EMPLOYER POLICIES AND PROCEDURES WHICH MAY BE APPLICABLE TO YOU ARE FOUND IN VARIOUS BENEFIT BOOKS, SUMMARY PLAN DESCRIPTIONS, AND COLLECTIVE BARGAINING AGREEMENTS. IF

APPROPRIATE, COPIES OF THESE DOCUMENTS WILL BE GIVEN TO YOU OR WILL BE MADE AVAILABLE FOR REVIEW UPON REQUEST.

NEW POLICIES AND PROCEDURES MAY BE ADDED AND EXISTING ONES MODIFIED OR DELETED FROM TIME TO TIME I HAVE READ AND UNDERSTAND THE ABOVE. IN CONSIDERATION OF MY EMPLOYMENT I AGREE TO FOLLOW THE EMPLOYER'S POLICIES AND PROCEDURES, INCLUDING ANY AMENDMENTS TO EXISTING POLICIES AND PROCEDURES AND ANY POLICIES AND PROCEDURES HEREAFTER ADOPTED."

There are two or three other aspects which would charge the Grievant with knowledge of the applicable policies and procedures. One is that the Grievant was employed in a supervisory position. She thus had responsibility not only for her own compliance with policies and procedures, but responsibility for training her staff as to the content of these policies and procedures and in how to comply with them. If she did not know of the policies and procedures, she had a responsibility to ferret them out so as to be able to carry out her supervisory responsibilities. Second, the Grievant's supervisory responsibilities were in the area of "Systems". This involves the operation of the computer systems in Store #186, including the 28 computerized registers in the Store. She thus presumably understood the entire process by which customers and staff purchased goods from the Store's stock and the operation of the computer systems. An employee in charge of purchasing stock for the automotive supplies department might be able to convincingly plead ignorance as to the accounting procedures governing his purchases as an employee, but it is less convincing coming from the Systems Manager of the Store. Third, the rules in question are not complex. They simply require "honesty" and that merchandise and products must be paid for by employees at the time of purchase and that no credit is to be extended. These are basic policies which an honest and reflective employee might be expected to understand even without review of a written policy on the point.

The conclusion then is that the Grievant is to be charged with knowledge of the policies and procedures in question. We turn to the next sub-issue.

C. The Evidence Concerning the Violation of the Rules in Question.

1. Introduction.

There are two instances of non-compliance cited against the Grievant. These concern the incidents, respectively, of August 27 and August 30, 2001. As to the former, the Grievant's defense is that she paid the money back. As to the latter, the Grievant's defense is that she intended to pay the money back but was confronted before she had a chance to do so. We turn to these in the order stated.

2. The August 27, 2001 Incident.

As described above, this incident involved the purchase of meals for the Grievant and her staff for a staff meeting on August 27, 2001 in the amount of \$12.12 including tax. The provision of such meals is countenanced in the Store procedures, but only with prior authorization. No such authorization was obtained. The transaction was "suspended" at the Food Court register. The Grievant later obtained \$12.12 from the "cash desk", ostensibly to enable her to pay for the meals.

The issue here is whether the evidence establishes that the Grievant did in fact subsequently pay for the meals in question or whether it established that she did not. The Employer's Loss Prevention Team Leader, Ms. Person 2, made an exhaustive analysis of the computer records to ascertain whether such a payment had been made. Her analysis indicated that the Grievant had not gone back to the Food Court and "un-suspended" the original suspended transaction by payment of the \$12.12. (Tr. 50-51) Ms. Person 2 also ran records concerning payments on resumed transactions and transactions other than resumed transactions

in a target amount³ of \$11.50 to \$12.50 on the day in question⁴. The bottom line of these searches was that they showed no payment at any of the registers in the store on the day in question, either through an "un-suspension" or otherwise of the amount in question. (Tr. 53-64, Co. Ex. 9)

Something of a cross-search was also made using UPCs, a code system for the items which the Grievant bought at the Food Court. These were then cross-checked against the video tapes of the customers making the payment at the time in question. Similarly, these did not turn up any video tapes of the Grievant making payment for the items purchased on the day in question.⁵

The Grievant does not apparently quarrel with the methodology of Ms. Person 2's research. Nor does she claim that the documents turned up in Ms. Person 2's search show that she did make the payment she claims to have made. Her claim is rather that she made the payment but that it does not show up in the records.

The genesis of this claim is largely as follows. In a handwritten statement apparently dated Monday, August 27, 2001, the Grievant stated:

"Sometime that day it was paid for in service area. Can't remember which lane in service as I worked 12 hours to close service area"

(Employer Ex. 12)

In a typewritten statement made by the Grievant on September 4, 2001 (Grievant Ex. 2) the Grievant claimed:

"To the best of my knowledge I then went to a front check lane and paid for it. The Unity system has no record of the transaction being resumed or the items being paid for under another transaction."

(Grievant Ex. 2)

³ The "target amount" is a word used by the arbitrator which indicates the range of the computer search. As he understands it, a search of "\$12.12" exactly would not be good computer procedure because the clerk inputting might have made 3 cent error which would not show up on an exact \$12.12" search.

⁴ There was one "in range" response, but it covered different items than those purchased by the Grievant, i.e. "Sunflower seeds, a mouse pad, paper and Caffein Free Pepsi." (Tr. 57).

⁵ The tapes did indicate some other customers purchasing some of the items in question and one tape of the Grievant and her boyfriend making a purchase that evening. (Tr. 62)

In her testimony at the arbitration hearing, the Grievant stated on direct examination, with respect to re-payment, that:

"A. I dropped it off at the cashier in the service area, across from the service desk. I just put it on her till. ...And said ring this in when you get time, because it was a holiday weekend and we were very busy, and I don't usually work in that area.

Q. Tell me exactly what you did with the money.

A. I had it with the receipt thing, I believe, and I put it on top of their like – not their keyboard but like the panel where the receipt thing comes out. And I said ring this in when you get time because, you know, we've got a whole bunch of people in each lane and they're 24 lanes there and we had how many open. ... I did pay for it. ...I don't know what else I could have done..."

(Tr. 115-116)

The Employer points out that the Grievant's explanations of her payment were much more detailed at the arbitration hearing than they were in her earlier interviews shortly after the incident. It seems to the arbitrator that the Grievant's explanations cannot be considered to be sufficient to indicate that payment was in fact made. It is common experience that when one makes a payment of money one wants to walk away from the transaction with some evidence that the payment has been made. Thus when one pays by check one eventually has the cancelled check as evidence. When one pays by credit card, one has the yellow copy as evidence, along with the eventual statement from the credit card Employer. When one pays cash, one gets a receipt. In the Grievant's case, even accepting her version, she just laid the \$12.12 on the counter and said "ring this in when you get time". Under the circumstances, the Grievant must bear the burden if the cashier pocketed the \$12.12; punched the wrong keys on the register or threw the money in the trash. The Grievant's version by failing to specifically identify the register or the name of the cashier made it impossible for the Employer to call the cashier as a witness and testify that the Grievant "never gave me no \$12.12 on that day". And, as indicated, the records of all the registers indicate that no \$12.12 payment was made that day.

On the whole then the evidence indicates that no \$12.12 payment by the Grievant was credited in the Employer's registers that day. If the Grievant simply forked over an uncredited payment of \$12.12 to an unidentified cashier on an unidentified register on that date, the Grievant bears the burden of the proper credit not having been made.

3. The August 30, 2001 Incident.

As indicated above, this incident involved the Grievant purchasing lunch for her self and one of her staff, Person 3, on August 30, 2001. The amounts were \$7.98 before tax and \$8.46 after tax. The transactions were suspended on the register at the Food Court. The lunch was something of an informal reward for Ms. Person 3 for her good work on the County Fair project. Unlike the August 27 incident, there is no indication that the Grievant's plans were that the Employer was going to pay for the lunches. In any event, the Grievant did not seek, or obtain, authorization for Employer-paid lunches or reimbursement for the amounts.

The facts here concerning re-payment of the amounts by the Grievant are simpler than with respect to the August 30, 2001 incident. The Grievant admits that she never re-paid the amounts involved. Her claim is instead that she intended to re-pay, but simply never had time to do so before she was confronted by the Employer. That confrontation apparently came on Tuesday, September 3, 2001 at 11:00 a.m. when the Grievant was first interviewed. (Tr.162). She supplied the "Statement of Employee" on Wednesday, September 4 (Grievant Ex. 2). So, the delay involved is between August 30 and September 3, 2001, essentially five days. (Tr.164) At the outset, it is clear that the Grievant did not pay for the lunches "at the time they receive the merchandise or products" as required by the Employer policy.

Most of the testimony on the issue concerned whether the Grievant had a plausible excuse for not paying during the five day gap. The Grievant's main excuse seems to have been

that she was busy with the Employer's participation in the fair; that the five day period spanned the Labor Day weekend and that she was not scheduled to work in Store #186 on all but one of intervening days between the lunch purchase and the confrontation. Her testimony is that the lunches were purchased on August 30, 2001, a Thursday. She had come back from the fair that day and worked at the Fair on Friday and Saturday, both. She was scheduled to work at the fair on Sunday, but also worked at Store #186 which was tumultuously busy. On Monday she was not scheduled. When she came in on Tuesday, she was first asked about the fair, but then was confronted about the lunch purchase. All of the foregoing may well be true, but it more or less begs the point. One of the purposes of the Employer's "pay immediately" policy is no doubt to lessen the dependence on employees' memories and to forestall employment decisions on the basis of whether the "I forgot" excuse is bona fide or not. Here five days did tick off the clock and the repayment was not made. It is this sort of situation to which the Employer policy is directed.

The other issues in play concern the bona fides of the Grievant's excuse for not paying for the lunches in the first place. The Grievant's original written statement, i.e. that of September 4, 2001 indicated that the reason was "I left my gift card that I was going to use to pay for it in the systems office."(Grievant Ex. 2) The handwritten statement that the Grievant gave to Mr. Person 1 concerning the August 30 events indicated that:

"I changed gray coats because I was working out in the heat. I left one in my truck. My gift card was in the other coat. I kept the receipt in the coat or office somewhere over the night or weekend."

(Co. Ex. 11)

The Grievant's testimony at the arbitration hearing was more along the lines of the "left it in the truck" version. (E.g. Tr. 148-149). The Employer cites the inconsistency to show that the

Grievant's version was concocted and inconsistent and apparently a part of her scheme to bilk the Employer out of the two lunches.

We turn to a conclusion. The essential fact is that the Grievant did not pay for the lunches at the time she bought them and consumed them. Nor did she pay during the following five days up until the time that she was confronted. Her subjective intent as to eventual payment is difficult to ascertain. But, the violation of the "pay at time of purchase" rule is established with respect to the August 30 events.

We move on to the disparate enforcement issue.

D. Disparate Enforcement

The standard being applied in this case is that of just cause. It is usually considered to be a violation of just cause standards to enforce a given rule in a disparate fashion with respect to different employees.⁶ Basically employees should be treated the same.

This being said, there are some qualifications to the rule. It pertains to essentially the same violations of the same rule. There also may be qualifications as to the number of disparate enforcements and the timing thereof. One tolerated violation ten years ago may not be sufficient to carry the day. Obviously it is only violations which are known to the employer which count. The employer cannot enforce a rule against violations of which it does not know.

The evidence with respect to the disparate enforcement claim is along the following lines. The Grievant in her testimony did not allude to any incidents of disparate enforcement. There was some testimony to that effect by other witnesses called by the Grievant.

1. Person 6 – was a former detective at Store #186. He purported to testify as to the

⁶ An argument made by the Grievant at the hearing, but seemingly not renewed in the post hearing brief.

general tolerance at the store for rule violations. (Tr. 190) He described a lengthy and fairly confusing incident in which one of his fellow security employees, Person 7, allegedly told a lie in connection with the extent or nature of his observation of a customer in the store. According to him the lie was obvious but no disciplinary action was taken against Mr. Person 7. He indicated on cross-examination that he did not know what disciplinary processes were followed, but alleged that 20% on the instances of dishonesty the violations were not handled correctly. (Tr. 200)

2. Person 8 – While working as a store detective she observed Mr. Person 9 eating grapes in the Food Court. She reported it, but to her mind, nothing was done. She was instead told that "to pick my battles and that wasn't one I wanted to pick." (Tr. 204) On cross-examination her attention was directed to a case involving two employees named Person 10 and "Person 11" in which they had apparently been eating food which hadn't paid for. (Tr. 208-209) The tenor of the cross examination was such as to indicate that the Grievant and her partner put the heat on this duo for violation of the "eating without paying" rules and that the duo were fired. (Tr. 218) With respect to Mr. Person 9, Ms. Person 8 indicated that it could have been possible that Mr. Person 9 was acting as Store Director at the time. She refused to agree that there could have been some other reason such as quality control for sampling the grapes. (Tr. 222)

3. Person 12 – Ms. Person 12 served as a cashier for almost a year between November of 2000 and October, 2001. (Tr. 223) She was familiar with suspended transactions and alluded to some which she claimed took place on a regular basis involving employees. As she described it, these would typically involve an employee who didn't have money or a drink card and would suspend the transaction. They would then find "Person 13 or a

manager" and "get them a drink card or get their money out of their locker or whatever" and "then they would come back and pay for it eventually." (Tr. 225) She also said that she witnessed employees "eating things and then paying for them later without even suspending the transactions." (Tr. 226) One "Person 14" was mentioned as a frequent participant in this practice. On cross-examination Ms. Person 12 acknowledged her knowledge of the policies involved; admitted that she did not know whether the particular employees had authorization from their manager to do what they did; and affirmed that the goods were always paid for by those employees before the end of the shift.

We turn to a conclusion on the disparate treatment issue. As indicated above, the disparate treatment doctrine will only be held decisive in cases where the given employer has reacted disparately to the same offense committed by different employees. Here the Grievant is charged with two instances of violating Employer's policies with respect to paying for purchases at the time they receive the merchandise or products. The most that can be said for one case specific case cited by Ms. Person 8 and the one specific case by Ms. Person 12 (along with several general allegations) is that they may have been a few or "some" cases in which an employee did not pay for the purchase at the time the merchandise or products were received. But, there were no details in the evidence concerning whether the deviation was authorized by management. More importantly, in Ms. Person 12's testimony she conceded that the employee involved paid for the merchandise before the end of the shift. The key difference is that in the instant case the Grievant not only did not pay for the two purchases at the time she made them, but did not pay for them thereafter. The Grievant's case is thus the only case among all those cited in which the purchase was not paid for at the time of the purchase, but not paid for at all. This is sufficient to render the disparate enforcement doctrine inapplicable.

VI. CONCLUSION

The present case is one involving the Employer's enforcement of its rules requiring payment for merchandise or products in total at the time they receive the merchandise or products. For the reasons stated, these rules are held to be reasonable, or at least not challenged in this proceeding. The evidence indicates that the Grievant on the two occasions in question did not pay for the goods in question at the time they were purchased and ingested, but did not pay for them thereafter. The disparate enforcement doctrine is invoked, but none of the cases cited involved ones in which the miscreant was shown to have taken the goods without authorization and not to have paid for the goods or merchandise thereafter. The disparate enforcement doctrine is therefore inapplicable.

To the extent that it may not be otherwise clear, the issue concerning the merits is answered in the affirmative, i.e. the discharge was for just cause. The award draws its essence from the arbitrator's interpretation of the stipulated issue.

VII. AWARD

Grievance dismissed.

Jerry A. Fullmer

Made and enter this

31st day of July, 2002