Martin #1

IN THE MATTER OF THE ARBITRATION

Between

EMPLOYER

and

EMPLOYEE

EMPLOYEE DISCHARGE

REPORT AND DECISION OF ARBITRATOR

In these proceedings, a single Grievance was submitted for an Award to James P. Martin, selected by the Employer and the Grievant to serve as Impartial Arbitrator herein. A hearing was held in City A, State A on August 28, 2001, at which the parties were fully heard. The following appearances were entered:

Briefs were filed and the hearing was declared closed upon the receipt of the last brief, October 24, 2001.

ISSUE

Was the discharge of the Grievant, Employee, for just cause? If not, what is the remedy?

NATURE OF CASE

The Grievant, Mr. Employee, was a Hardware Clerk, with six years of seniority with the Employer. On December 29, 2000, the Grievant took home some 54 pegboard hooks, part metal and part plastic, which he had retrieved from an area in the rear of the store. He did not report the taking of them, did not check them out, and did not get permission to take them. The Grievant

acknowledged that he took these hooks, and that he felt the Employer had no further use for them, and was going to dispose of them anyway He testified that he felt that taking something of no value was not a violation of the Employer's policy on theft or unauthorized possession of Employer merchandise. An Employer witness testified that there are two types of hooks used in the "fast track" displays throughout the stores, all plastic and metal/plastic. The all plastic hooks are thrown away, the Employer saves the metal/plastic hooks for reuse. The hooks taken by the Grievant were the metal/plastic hooks. The Grievant testified that he was unaware that there was any difference between the two hooks.

A store detective observed the Grievant putting the hooks in a shopping cart, and taking them out of the store. None of the facts concerning the incident of December 29th is in dispute, since the testimony of the Employer detective and of the Grievant are essentially identical.

The Employer interviewed Mr. Employee, determined from his statement that he had indeed taken the hooks without permission, and included in their considerations his acknowledgment that he had previously requested permission from management to take items out of the store and had received such permission. At least one of the items was to be scraped, and the Grievant was aware that it was of no value to the Employer, yet he sought permission to take it home anyway. It was a large wire rack, and not possible to be removed from the store without being observed.

The Employer has guidelines which state:

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

CONTENTIONS

According to the Employer, it has a clearly established policy that provides for termination for any employee, regardless of mitigating circumstances, guilty of theft or unauthorized possession of Employer property. The Grievant acknowledged that he had taken, without permission, some 54 pegboard hooks which were the property of the Employer. Mr. Employee was discharged for this action, after investigation, and his appeal should be denied as without merit. There has been no occurrence of theft or unauthorized possession of Employer property which has not resulted in the immediate discharge of the employee involved. Mr. Employee was not discriminated against, singled out, nor treated in any way different that any other employee, and was in fact treated consistently with the Employer policy. The grievance should be denied.

According to the Grievant, he was not guilty of theft because he had no intent to steal. The property he took from the Employer was scrap, of no value to the Employer, and the taking therefore was not theft. Further evidence of this innocence of theft is the fact that the Employer never prosecuted him for theft. Unless the arbitrator has authority to vary from the Employer's draconian rules, the process is a farce. The Grievant was not terminated for just cause, and he should be reinstated with back pay.

DISCUSSION

Taking the Employer's position first, it is clear that it has made a prima facie case of Mr. Employee violating Employer guidelines relating to unauthorized possession of Employer property Theft and unauthorized possession are disjunctive, and either is grounds, under the Employer guidelines, for immediate discharge. There was no evidence admitted that would even suggest that the Employer has not consistently and without exception followed its guidelines and

discharged any employee, regardless of the value of the property or the seniority of the employee. With the acknowledgment of the Grievant that the pegboard hooks which he took were Employer property, that he had no authority to take that property, and that he had no intention of returning the property, the case is made.

Mr. Employee raises several defenses. The first is that his actions on December 29th did not constitute theft. I do not disagree with that contention, though I do not find it necessary to make a finding on that fact. The Grievant may well have felt he was taking something of no value to the Employer, and did not intend to deprive the Employer of anything of value therefore. However, with the disjunctive nature of the charge, theft is not necessarily involved. The unauthorized possession of Employer property is equally forbidden by the guidelines, and the theft or unauthorized possession justify, according to the Employer guidelines, immediate termination. It is obvious, as Mr. Employee alleged, that employees constantly have possession of Employer property on store premises, moving it about for display, and delivering it to customers. However, that type of possession is authorized, and is of course expected in a retail environment. What is unauthorized is the possession of Employer property off premises. Again, there is no question but that the property was taken off the Employer premises, and placed in Mr. Employee's home. This more than adequately establishes the fact that Mr. Employee was exercising unauthorized control over Employer property.

The principal charge made by Mr. Employee is that the rules are draconian, and should not be allowed to stand. He claims that the arbitrator should change the rules, because to do otherwise would make the entire process a farce. If there is nothing to do but add the Grievant's statement to the Employer guidelines and come up with a conclusion identical to that of the Employer, then, according to Mr. Employee, the arbitrator is simply a foil in a Machiavellian

plot to remove the Grievant from his employment. It is true that there are cases where the evidence is so clear that any kind of trial, in any type of jurisdiction, could be called a mockery. If a person is videotaped setting fire to a building, admits he did it after his arrest, and then pleads not guilty nevertheless, the result is foregone. It is foregone, but not a mockery. I accept the fact that the Employer has a right to establish reasonable guidelines, and the guidelines against unauthorized possession of Employer property in a retail environment is most assuredly not arbitrary nor capricious. It is good business practice. The inability of the arbitrator to change the rules to suit his version of good inventory control is no different than a judge ruling on a speeding case, where a posted speed limit is acknowledgedly violated by a defendant, who asked the judge to dismiss the case because the speed limit is improperly set. The judge has no authority to make such finding; he is bound to rule based upon the existing law which established the speed limit. Herein the case is the same. The Employer has established what has been found to be reasonable guidelines, and they cannot be changed under the peer review and arbitration procedure of the Employer. Had I the right to change them, I would not do so because I feel they are reasonable.

Are they reasonable as applied to Mr. Employee? Militating against the Grievant's claim of bad judgment is the Grievant's acknowledgement that he had previously wanted scrap, and asked for and got permission to take it. In this case, once again he felt he was dealing with scrap, of no value to the Employer. That is not his judgment to make. In fact, it appears from the evidence that the Grievant made an error in judgment, deciding that metal/plastic hooks are the same as all plastic hooks, one being scrap, one being reusable. Regardless of this error, and even if what he took were all plastic, the Employer found that the Grievant violated its guidelines, and Mr. Employee acknowledged that he had violated them. There is no basis for finding that the

guidelines are improper, there is no way to find that the Grievant did not violate them, since the evidence is basically his own words, and there is no basis for overturning the Employer's decision. The grievance must be denied.

AWARD

That the Employer discharged Mr. Employee for just cause, in accordance with its established and well published guidelines; that the grievance shall be and hereby is denied.

James P. Martin

Labor Arbitrator

December 3, 2001