

Beckman #4

VOLUNTARY ARBITRATION PROCEEDINGS

Termination Appeal Procedure

David L. Beckman, Arbitrator

Employee, Appellant

In the Matter of Arbitration between:

EMPLOYER

And

EMPLOYEE

OPINION AND AWARD

Date of Assignment: June 18, 2002

Hearing: September 24, 2002

Brief due Date: November 11, 2002

Date of Decision: December 2, 2002

ISSUES

- (1) Does the evidence establish just cause for the termination of the employment relationship between the Employer and Employee on or about March 24, 2002?
- (2) If not, what is the remedy?

**RELEVANT PROVISIONS
of the
TERMINATION APPEAL PROCEDURE**

Purpose and Scope

This procedure has been established to provide an exclusive, final and binding method for the Employer and any eligible team member to resolve all claims, controversies, disputes or complaints arising out of or relating to the team member's termination from employment, including any claims or complaints based on federal, state or local law. In the event a team member 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.

Notwithstanding the foregoing, decisions to terminate employment for business or economic reasons may not be challenged through this procedure. Decisions to terminate employment for business or economic reasons remain within the sole judgment and discretion of the Employer.

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 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 lesser action.

Relief

If the arbitrator finds that the team member 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[ed] the team member'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 attributable to the team member'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 reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

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.

EMPLOYER POSITION

The Employer contends that it had just cause to discharge Mr. Employee for falsifying his employment application by omitting his criminal history. The act of falsification was deliberate or willful and it was material both when it occurred and when it was discovered. The Employer acted promptly and in good faith in taking discharge action. See Tiffany Metal Products, 56 LA 135 (1971) for the four-part test used by Arbitrator Raymond Roberts to determine whether the facts constitute grounds for discharge.

1. The omission of the criminal history was willful and deliberate: Mr. Employee admitted to Mr. Person 2 and again at the hearing that he deliberately did not reveal his criminal record because he did not want people to find out about it. But regardless of the motivation for the omission, it was a willful act.

2. The omission of the criminal history was material to the employment at the time it was made: As a retailer, the Employer is concerned about theft, and about how its employees will interact with the public. The Grievant's conviction for receipt of stolen property raises concerns about his honesty. His conviction for DUI raises a concern about whether he has a problem with alcoholism. His three convictions for driving without insurance raise concerns about his financial responsibility and stability. His conviction for first-degree murder during a burglary raises concerns both about his honesty and his propensity toward violence.
3. The omission of the criminal history was material to the employment at the time of the discharge: Arbitrator Roberts pointed out in Tiffany, *supra*, that "time may have healed the prejudicial effect of the misrepresented matter." But that was not the case here. The passage of time did not ameliorate the Grievant's criminal record. He was responsible for directly interacting with the public and local authorities. Questions about his honesty, credibility, alcohol use and propensity for violence remained relevant, because of the work he did.
4. The Employer acted promptly and in good faith when it discovered the omission: As soon as Mr. Person 2 learned that Mr. Employee may have served time in prison, he conducted a thorough criminal history investigation and promptly referred the matter to the store director and the OMP Relations department.

The Employer has a written honesty policy. The policy applies to all team members. The loss prevention team members are held to an even higher standard, because of their unique duties. The Employer demands complete honesty from them. The employment application was the first opportunity for Mr. Employee to be honest with the Employer, and he was not. He was

again dishonest when he transferred to the loss prevention department in that he gave team leader Person 1 vague and misleading information about his conviction 30 years earlier, and he completely omitted all mention of his other convictions. Finally, he was dishonest when he told Mr. Person 2 during the investigatory interview that the charges for receiving stolen property had been dropped, when in fact he knew that they had not been.

The repeated dishonesty suggests that the Employer cannot ever again accept his statements or signature on an official report as verification that the facts contained in the report are complete and accurate. The bond of trust has been broken and cannot be repaired. Therefore, we ask that the discharge be upheld.

EMPLOYEE POSITION

It is the position of Mr. Employee that the Employer did not have just cause to discharge him. He had already worked for the Employer for three months as a temporary employee before he was hired. The manager came to him and asked if he would like to go to work for the Employer on a regular basis. The manager pulled up his application, and at that time the application was three months old. When Loss Prevention Team Leader, Person 1, discussed his move to the Loss Prevention department, Mr. Employee told her that he had a past criminal history. Person 2 did not become involved until after Ms. Person 1 left the Store. The Employer knew of the criminal record long before the discharge.

Under the facts, the discharge was arbitrary and unjust. Mr. Employee was a good employee and he was trying to rehabilitate himself in the work he was doing for the Employer. The Employer had no quarrel with his work. Under all of the circumstances, the arbitrator should find a lack of just cause and reinstate Mr. Employee with all back pay and benefits he lost by reason of the unjust action of the Employer.

INTRODUCTION

The Termination Appeal Procedure which Employer, Inc. (herein referred to as Employer, Employer or management) makes available to an employee (herein referred to as Appellant or Employee) who has been discharged contains provisions which allow for final and binding arbitration. Under that procedure, David L. Beckman, Louisville, Kentucky was selected as Arbitrator to decide the issues set forth on page 2 hereof. The hearing was held at the Hotel A— City A, State A on the date set forth on the cover page hereof.

The proceedings were transcribed. Full opportunity was given to each party to present evidence, to examine and cross examine witnesses, to state positions and to make arguments with respect to the evidence. Following the hearing, both parties had an opportunity to review the transcript of evidence and to file a written brief with the arbitrator. The Employer filed a brief. Mr. Employee did not.

FINDINGS OF FACT

On December 3, 2000, Employer hired Employee to work in the building services department of Store #XXX in City A, State A. His application for employment was dated October 31, 2000.

On March 24, 2001, Mr. Employee transferred to the Loss Prevention Department as a part-time loss prevention coordinator. In June 2001, the status of Mr. Employee changed from part-time to full-time.

In July 2001, Person 2 took over as manager of the Loss Prevention Department. In September 2001, Mr. Employee requested a transfer back to part-time status, because he had taken another job with an industrial Employer.

In February 2002, one of the store detectives heard Mr. Employee say that he had served time in prison and he passed this information on to Manager Person 2. Person 2 looked at the employment application of Mr. Employee and noticed that it stated, in relevant part, as follows:

Have you ever been convicted of a crime? Yes
If yes, list dates and details: Traffic

PLEASE READ THE FOLLOWING AND SIGN BELOW

I acknowledge that the facts set forth on this application are true and complete. I understand that if employed any false statement or omission on this application or any attachment shall be sufficient cause for dismissal. ...

Manager Person 2 informed his Store Director of what he had found, and he then conducted a criminal history check in both County A and County B counties. He obtained documents to support his findings. Person 2 then interviewed Mr. Employee and showed him that he had records showing a conviction for receiving stolen property. Employee indicated at first that the charge had been dropped. But when shown paperwork indicating to the contrary, Employee acknowledged that the charge had been reduced from a felony to a misdemeanor. The criminal history records established that Employee was convicted of first degree murder in 1972 and was sentenced to life in prison. He served 15 years of the sentence and was released. Since that time, the records show that he has either been convicted or that he has plead guilty to:

- driving over a double yellow line and speeding;
- driving without insurance three times;
- failure to take a breathalyzer test;
- driving under the influence twice;
- possession of an open container of alcohol in public;
- criminal trespass and receiving stolen property.

Before being hired, Mr. Employee was interviewed by several managers, but he did not disclose any of the aforesaid criminal convictions during the interviews. He allowed the managers to believe that he had a record only of traffic offenses.

Employee told Person 2 that he did not reveal his criminal record on the application for employment, because he did not want people to find out about it. Based on the information he had accumulated, Manager Person 2 suspended Mr. Employee pending further review.

Manager Person 2 forwarded all of the criminal records and interview notes to OMP Manager, Person 3, for his review and recommendations. It was Person 3's responsibility, as Manager, to make recommendations on discipline and discharge questions for office management and professional employees. He recommended that Mr. Employee be terminated for falsification of his employment application and for violation of the honesty policy. Thereafter, the store director and Mr. Person 2 met with Mr. Employee and informed him on or about March 24, 2002, that his employment relationship was terminated.

In a document, dated March 25, 2002, Employee directed the following statement "To Whom It May Concern:"

I would like the administration of Employer to understand that I did not falsify my application for employment with Employer. Three management interviews were conducted with me prior to my employment. The interviews were given by the Co-Store Director, the Night Store Director, and the Team Leader of Building Services.

All questions were answered truthfully; no one asked about my past record. No one asked me to explain any part concerning the application. Three months later I interviewed and transferred into the Loss Prevention Department, I spoke with Person 1 regarding my record from thirty-two years ago on my record. Person 1 informed me that as long as I passed the Honesty Test and performed a good job for Employer there would be no problem.

In the last eighteen months I have been evaluated many times and have received raises accordingly. I received the Employer Certificate of Achievement on February 12, 2002 for exceptional efforts regarding LPC Recovery. I have had only Employer's interest at heart since I started working for Employer. I have been a dedicated employee. I have

worked when I was ill, went in whenever I was called, and have stayed over numerous times.

I feel my termination was unjust, biased, and discriminating against me. I feel that the retaliation against me is wrong. I have already paid for my mistakes; it is not Employer's place to continue to make me pay for something that happened thirty-two years ago.

My life revolved around the Employer Store. I had planned to retire from the store. My family's financial support has been stripped away because of the decisions made by the corporate administration. I feel that the decision is incorrect. I am requesting a review of my termination.

The termination appeal inherent in the above was reviewed by management, and on April 29, 2002, management answered, as follows:

The termination of your employment was done with just cause for falsification of your employment application and violation of the honesty policy. Our investigation further found no evidence of discrimination or retaliation.

On May 7, 2002, Employee requested that his case be sent to arbitration. Thereafter, the arbitration process was implemented and the case was heard in arbitration on September 24, 2002.

The Employer has an "Honesty Policy" which was restated in 2001. The document introduced into evidence was signed by Mr. Employee and states as follows:

NOTICE
TO: ALL TEAM MEMBERS
REGARDING: HONESTY

In order to be a strong and healthy Employer in today's business world, we depend on you to be totally honest. The Employer believes strongly that there can be no exception to this rule in light of the nature of our operation which deals with such a wide variety of merchandise. This longstanding condition of employment has been and must continue to be applied and enforced throughout the Employer.

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 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.

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.

We hope that this restatement prevents any misunderstanding from occurring in the future.

If you have any questions please contact your first assistant.

Employer

/s/ Employee 6/19/01

In connection with the transfer to the Loss Prevention Department, Mr. Employee said that he talked with Person 1 who was manager of the department at that time. He testified that he told Person 1 he had served time in prison, but on cross examination he acknowledged that he did not tell her that he had been in prison as a result of a conviction for a crime, nor did he disclose to her the specifics of the conviction. He said that when he told her that he had spent time in prison, she responded by saying she did not want to hear it. He maintained that he did not tell her everything, because she did not want to hear it. He said that she did not ask whether he had any theft-related offenses on his record. He admitted on cross examination that he was referring to the murder conviction in talking with Person 1, and that he was not referring to any other convictions. He stated that the murder was committed in the course of a robbery.

At or about the time the Employer was involved in the investigative process, Mr. Employee set forth in his own handwriting his reaction to the proposed termination. The statement was given to the Employer for evaluation. Mr. Employee stated, in part:

I talk[ed] with the team leader of the loss prevention dept. after I was there a few months—her name was Person 1. I explained to her that I had some things on my record from thirty years ago. She said that Employer's was a good Employer to work for and as long as I could pass the Honesty test and do a good job for the Employer everything would be all right. She said Employer's was an Employer that believed in helping one who does their work and lives by the laws of our land. I believe I've done a good job for you and I would continue to do so as long as I am given a chance. I am & always have been loyal and honest with all my Supervisors and Directors.

I did something crazy and stupid when I was a young man. I'm not proud of what I did, so I try not to talk about it unless I have to. That's why I only talk[ed] to Person 1 about it. I have found in the past that it is very hard to work with other people when they know things like this about you so I didn't want the people I was working with to know this. I didn't try to hide anything from my Employer—it's the other employee's you work with that look down on you when they know something like this about you. ...

Mr. Employee finished the statement with a paragraph describing his fondness for his family and making a plea that he had paid his dues and deserved a chance to live his life with his family and friends. He asked that his future be based on his record with Employer and on the basis of his honesty since he became employed by Employer.

OPINION

The inquiry needed to resolve the dispute in this case may fairly be stated as follows: Considering all of the concerns raised by Mr. Employee, does the evidence establish that the Employer acted with just cause in terminating the employment relationship?

The Employer has alleged that the termination was based on the premise that Mr. Employee falsified his application for employment and violated the honesty policy. The first question is whether Mr. Employee falsified his application for employment. The evidence on this issue is not in dispute. Mr. Employee did not disclose the full amount of the information required by the question as to whether he had ever been convicted of a crime. Instead of giving the "details" reasonably required by his affirmative answer, he merely put the word traffic on the application. The answer was false in the sense that it was not the full truth about his conviction.

history, and the answer was false in the sense that it tended to suggest that his convictions were no worse than the normal experience of most drivers, i.e., that they have been guilty of committing traffic offenses.

The next question is whether Mr. Employee violated the honesty policy. The policy is set out in full above. The policy terms indicate that it is a "restated" policy. The evidence is that Mr. Employee signed as having received a copy of the restated policy on June 19, 2001. The terms of the policy prior to the restatement were not put in evidence, but it is clear that Mr. Employee was on notice that honesty was a requirement prior to December 3, 2000, the date he was hired. This is evident from the application for employment which contained its own reference to the need for truthfulness. Indeed, the application itself indicated that an employee could expect to be dismissed for "any false statement or omission." Mr. Employee maintained that he did not falsify his application, but it is clear that he omitted material information (his criminal history). I hold that the omission by Mr. Employee is in the category of a dischargeable offense, because he had a stated obligation to give full and complete answers to the questions on the employment application. Similarly, his signature on the Honesty Policy, as of June 19, 2001, should have reminded him of his obligation to be honest with his employer. I find that Mr. Employee violated the Honesty Policy.

The application for employment was filled out by Mr. Employee on October 31, 2000. He knew or had reason to know that he had an obligation to be honest with his answers on the application, because the application itself stated, in relevant part: "I acknowledge that the facts listed on this application are true and complete." The facts stated on the application by Mr. Employee were not true and complete. It is clear that his answer to the question whether he was convicted of a crime was not "complete." It was incomplete. Additionally, it is not unreasonable

to infer that the answer, as given ("traffic"), was intentionally designed to suggest to anyone who read the application that there was nothing about the convictions to be unduly concerned about. Such facts are sufficient on which to base a finding that the Employer has met the burden of proving a *prima facie* case for termination. That is, unless there is a reasonable basis for finding merit in an affirmative defense presented by Mr. Employee, the evidence provided by the Employer supports the conclusion that the termination was based on cause, and was neither arbitrary, nor capricious.

The Defenses of Employee

Mr. Employee has claimed that the termination was unreasonable under all of the circumstances. The points he has made in his own defense fall into three categories which may be summarized as follows: (1) inasmuch as he has worked for the Employer for a period of time, the question about whether the termination is fair or just should be decided by referring to his record as an employee, rather than to his past life; (2) since he made a disclosure to Person 1, the arbitrator should treat her response to his attempted disclosure as a waiver of the issue of falsification of employment application; (3) in the alternative, considering his family obligations and his good faith efforts to provide for his family, the arbitrator should find that the penalty of termination is too harsh and unreasonable, given all of the circumstances.

The first defense is essentially that the falsification of employment issue should be held to be irrelevant, since acceptable service was rendered to the Employer by Mr. Employee, after the alleged falsification occurred. The Employer has countered this argument with the assertion that the omission of the criminal history was material both at the time it occurred and at the time of the discharge. I find that the issue of falsification is material, because the Employer is a retailer, and as such it has the right to a full disclosure of criminal history, because the history of

criminal convictions may provide relevant and material information needed for a fully informed hiring decision. I further find that the omissions, which occurred on October 31, 2000, were material at the time of the termination, because Mr. Employee had worked his way into the Loss Prevention department, where his criminal history, may well have affected some of his work adversely to the detriment of the Employer. For example, it is within the job of a loss prevention employee to be called upon to testify in cases of theft, or shoplifting. As a witness in court, the criminal history of a prosecuting witness may well be considered as relevant information on cross-examination, and could present credibility problems for decider of the facts. The Mr. Employee' criminal history may well have been considered by the Employer as a disqualifying factor in the type of work in which he was engaged. The fact that Mr. Employee withheld his criminal history from the Employer was unreasonable, because it prevented the Employer from making a fully-informed hiring and a fully-informed promotion decision. The defense that the omission of the criminal history on the application should be considered irrelevant by the Arbitrator, if declared to be valid, would prevent the Employer from making the very decision that it has a right to make as an employer, namely whether the applicant is suitable for employment in a retail establishment. The Arbitrator lacks the power to enforce such a result. Accordingly, I find no merit in the first defense.

The second defense is the inferred allegation that the Employer waived the right to use the falsification issue, on the ground that Manager Person 1, according to Mr. Employee's testimony, did not want to hear the details of his past criminal history. The Employer has claimed this defense to be without merit by pointing out that Mr. Employee did not make a full disclosure to Ms. Person 1. The evidence is that Mr. Employee, in a discussion with Manager Person 1, alluded to the fact that he had served time in prison a long time ago. Essentially, Manager Person

1 told him that as long as he was honest, he would be all right. Do such facts provide a sufficient basis to support a conclusion that the Employer waived the right to raise the falsification issue as a ground for termination? I think not. First of all, there is room for a reasonable inference that Manager Person 1 had no reason to believe that she was being put in the position by Mr. Employee of making an after-the-fact ruling on the propriety of his employment application. Rather, the evidence suggests that the context of the discussion was that a newly-promoted employee was feeling insecure about the promotion, and the manager chose to adopt a reassuring tone to help the employee get over the insecurity. It is reasonable to infer that the manager did not know that the discussion started by the employee may have been due to his guilt over the fact that he had made material omissions on his application for employment. Secondly, it is not clear that Mr. Employee disclosed enough details to alert Manager Person 1 that she should take investigative action rather than nurturing action. In conclusion, I find insufficient evidence to conclude that the Employer waived the right to act on the falsification issue.

Finally, Mr. Employee argues that the penalty of termination is too harsh. He notes that he was in a particularly difficult position, because he was trying to rehabilitate himself so he could provide for his family, and he was trying to shield his family from the details of his past history. Further, he stated that making a full disclosure of his past criminal history militated against his personal goal of becoming a successful employee, inasmuch as fellow employees are unable to reciprocate in a supportive way, when they know the details another employee's past life. I find that Mr. Employee was eloquent in explaining his predicament, but the act of recognizing that there were problems associated with Mr. Employee making a full disclosure of his past criminal conviction history does not mean that the Arbitrator is foreclosed from holding that the employer has a right to full disclosure of material information. The fact is that the

employment application clearly asked for a "true and complete" disclosure of information, and the additional fact is that Mr. Employee failed to provide the requested complete disclosure. The reality is that even though there may be problems associated with making a complete disclosure, the willful failure to make such a disclosure is nevertheless a dischargeable offense. The employer who operates a retail establishment has a right to know an applicant's criminal conviction history. The right exists, because it is reasonable for such an employer to make informed hiring decisions. Accordingly, regardless of how one feels about the predicament that Mr. Employee was in, it is evident that he deprived the Employer of the opportunity to make an informed employment decision. The Employer had a right to assume that Mr. Employee was being honest in answering that his criminal convictions were merely traffic related. When the Employer finally did learn the full details of the criminal history, its reaction was that the trust inherent in and necessary to a successful employment relationship had been broken. I find that the Employer's reaction was not unreasonable under the evidence presented. Accordingly, I find that the penalty of termination was not too harsh under the circumstances applicable to Mr. Employee.

Conclusions of Law

After considering all of the evidence, and after evaluating the arguments of the Employer and the defenses of Mr. Employee, I have concluded that the Employer did not act unreasonably in determining that termination of the employment relationship with Employee was proper. In my judgment, the evidence presented supports the conclusion that the Employer had just cause to end the employment relationship. The timing of the Employer's termination action (approximately a year and one-half after the application for employment was signed) was not unreasonable, because the failure of Mr. Employee to supply material facts, and his use of the

term "traffic" had the intended effect of causing the Employer to make no further inquiry about his past criminal conviction record. Mr. Employee failed to give a full and complete answer to a material question and thereby unreasonably lulled the Employer into the belief that he had no criminal convictions of a non-traffic nature. This resulting falsehood deprived the Employer of the opportunity of making a fully-informed employment decision at the time Mr. Employee was hired. Mr. Employee was guilty of falsification by omission of a material fact. The falsification was willful. The Employer is engaged in the retail sale of merchandise and food. The omitted criminal history was material to the Employer as an employer. The remedy of termination is just and proper under all of the circumstances. It is not too harsh for the wrongdoing involved. There is no merit to the appeal of Mr. Employee.

AWARD

The Appeal of Employee is denied.

DAVID L. BECKMAN